

NORTH CAROLINA  
COURT OF APPEALS  
REPORTS

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CASES

ARGUED AND DETERMINED IN THE

**COURT OF APPEALS**

OF

NORTH CAROLINA

AT

RALEIGH

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PAMELA GAY, EXECUTRIX OF THE ESTATE OF JOAN R. FRANKLIN, PLAINTIFF  
v.  
SABER HEALTHCARE GROUP, L.L.C., AND AUTUMN CORPORATION,  
D/B/A AUTUMN CARE OF RAEFORD, DEFENDANTS

No. COA19-964

Filed 21 April 2020

**Arbitration and Mediation—motion to compel arbitration—existence of agreement to arbitrate—ambiguous**

In a negligence and wrongful death action filed against an elder care facility by a deceased patient's estate, the trial court properly denied the facility's motion to compel arbitration because the facility failed to prove the existence of an agreement between the parties to arbitrate disputes regarding the patient's care. The arbitration agreement's signature page (which was the only page of the agreement the facility presented to the patient at the time of signing) conflicted with the facility's general admissions agreement (which incorporated the arbitration agreement by reference) where the former stated that the parties waived their right to trial while the latter expressly reserved the parties' right to a bench trial; thus, the arbitration agreement was ambiguous as a matter of law.

Judge TYSON dissenting.

Appeal by defendants from order entered 11 June 2019 by Judge Mary Ann Tally in Hoke County Superior Court. Heard in the Court of Appeals 17 March 2020.

**GAY v. SABER HEALTHCARE GRP., L.L.C.**

[271 N.C. App. 1 (2020)]

*Henson Fuerst, P.A., by Rachel A. Fuerst and Shannon M. Gurwitch, and Britton Law, LLP, by Rebecca J. Britton, for plaintiff-appellee.*

*Parker Poe Adams & Bernstein LLP, by Bradley K. Overcash and Daniel E. Peterson, for defendants-appellants.*

ARROWOOD, Judge.

Saber Healthcare Group, L.L.C. and Autumn Corporation (“defendants”) appeal from an order denying their Motion to Compel Arbitration and Stay Proceedings. For the following reasons, we affirm the trial court’s order.

I. Background

The central issue in this case involves the interpretation of contractual language in a series of documents signed in the admissions process for defendants’ elder care facility. Janine Lightner (“Ms. Lightner”) was referred to Autumn Care of Raeford, defendants’ facility, (“the facility” or “Autumn Care”) after determining that her mother’s health required more advanced elder care than that which could be provided in her current placement. Ms. Lightner’s mother, Joan R. Franklin (“decedent”), had lived for five years in a nearby assisted living facility following a stroke. Decedent also suffered from Parkinson’s disease and Lewy Body dementia. On 18 April 2017, Ms. Lightner signed the relevant admission paperwork and decedent was admitted to Autumn Care. Decedent subsequently suffered from a series of falls while at Autumn Care and died on 14 June 2017.

These events gave rise to the cause of action in this case. Pamela Gay (“plaintiff”), decedent’s other daughter, is the executrix of her estate. On 30 April 2019 plaintiff filed a complaint on behalf of decedent’s estate, asserting claims of negligence and wrongful death arising from defendants’ allegedly improper response to decedent’s falls. In response to plaintiff’s complaint, defendants filed a Motion to Compel Arbitration and Stay Proceedings. Defendants’ motion claimed that plaintiff was required to arbitrate any dispute related to care of decedent because Ms. Lightner signed an arbitration agreement on the day decedent was admitted to the facility.

Plaintiff filed a memorandum in opposition to defendants’ motion, maintaining (a) that Ms. Lightner never entered an arbitration agreement with defendants on the day of decedent’s admission to Autumn Care, or, alternatively, (b) that any such agreement was void because defendants

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[271 N.C. App. 1 (2020)]

owed decedent a fiduciary duty at the time her representative signed the admissions paperwork. Among other items, plaintiff attached Ms. Lightner's affidavit and the relevant admissions paperwork as exhibits to her memorandum in opposition to defendants' motion.

On 10 June 2019, the trial court held a hearing on defendants' motion to compel arbitration. Plaintiff introduced the exhibits from her memorandum into evidence. Defendants presented no evidence at the hearing in support of their contention that the parties had agreed to arbitration. Plaintiff's evidence tended to show the following.

Ms. Lightner's affidavit detailed the process she underwent to admit decedent to Autumn Care. Ms. Lightner averred that she toured the facility on 10 April 2017. She returned to the facility with decedent on 18 April 2017. After further reviewing the facility, Ms. Lightner and decedent met with two members of Autumn Care's admissions staff to complete the admission application and other documents. Ms. Lightner alleged one of the staff members informed her the facility's admissions process was new, "it was her first day in admissions at Autumn Care," and the other staff member was there "to train her." Ms. Lightner stated that "the whole process seemed disorganized: almost like they did not know what they were doing."

Ms. Lightner asserted the facility staff presented her with "an iPad and a few loose papers with the admissions information." Most of the documents Ms. Lightner signed were presented on the iPad "but some were on random loose pieces of paper." She was presented some pages of paper documents to sign that appeared to be ripped out of a binder of other materials. Many documents presented on the iPad were in "foot-note-sized font" and could not be magnified for ease of reading. Such documents included the signature pages of an "Admission Agreement" ("the admission agreement") and a separate "Resident and Facility Arbitration Agreement" ("the arbitration agreement").

Ms. Lightner signed both of these documents, but stated that the pages of the arbitration agreement preceding its signature page were not presented to her before or after her signature on the day decedent was admitted to Autumn Care. She stated that the facility's admissions staff "did not explain documents in detail." She did not recall the staff "ever discussing any arbitration agreement or using the words arbitration agreement at any point."

Ms. Lightner requested printed copies of the documents she signed on the iPad, but the employees handling her onboarding were unable to furnish physical copies. Months after decedent's admission, she received

what she characterized as a disorganized “packet of paperwork.” She did not recall ever seeing the full arbitration agreement in that packet and asserted she did not see it until after decedent’s death.

In its order, the trial court made a finding adopting the version of events averred in Ms. Lightner’s affidavit:

Ms. Lightner’s sworn affidavit described the events that transpired when she signed the admission paperwork for [decedent]. The content and format of the documents she signed reveals that only the signature paragraph . . . was presented to Ms. Lightner for electronic signature in very small print on an iPad and pages 1 and 2 of the purported 3 page document were never available, shown or explained to Ms. Lightner prior to her electronic signature. Pages 1 and 2 of the purported arbitration agreement were provided, amongst a mixed up package of documents . . . at a later time after [decedent] was residing at Defendant’s [sic] facility. Ms. Lightner did not remember ever seeing the purported arbitration agreement until her attorney showed it to her long after [decedent] had passed away.

The trial court also found that defendants had presented no evidence in support of their claim that the parties had agreed to arbitrate. Reviewing the admission agreement and the arbitration agreement’s signature page, the trial court found the following:

The Admission Agreement, page 8, paragraph J, . . . incorporated into the Admission Agreement by reference: “all documents You signed or received in the Admission Packet during the admission process to the facility.”

. . . .

Defendants’ Admission Agreement, specifically within the terms of the Admission Agreement’s signature page, states: “The resident/representative and facility hereby mutually agree to irrevocably waive any and all rights to a trial by jury (while expressly preserving any and all rights to a bench trial) . . . .”

Based upon these findings, the trial court concluded that: (1) the admission agreement and arbitration agreement were internally conflicting, “one purporting to agree to expressly reserve the right to a bench trial and another purporting to agree to arbitration[;]” and, (2) defendants owed and violated a fiduciary duty to provide decedent

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[271 N.C. App. 1 (2020)]

specialized care. On these grounds, the trial court denied defendants' motion to compel arbitration. Defendants timely filed their notice of appeal to this Court.

## II. Jurisdiction

"An order denying defendants' motion to compel arbitration is not a final judgment and is interlocutory. However, an order denying arbitration is immediately appealable because it involves a substantial right, the right to arbitrate claims, which might be lost if appeal is delayed." *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 418-19, 637 S.E.2d 551, 554 (2006) (internal quotation marks and citations omitted). This Court possesses jurisdiction over this interlocutory appeal. N.C. Gen. Stat. §7A-27(b)(3)(a) (2019).

## III. Standard of Review

"A dispute can only be settled by arbitration if a valid arbitration agreement exists." *Slaughter v. Swicegood*, 162 N.C. App. 457, 461, 591 S.E.2d 577, 580 (2004) (citation omitted). "If a party claims that a dispute is covered by an agreement to arbitrate but the adverse party denies the existence of an arbitration agreement, the trial court shall determine whether an agreement exists." *Id.* (citation omitted). "The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Id.* (internal quotation marks, alterations, and citations omitted). "The trial court's determination of whether the language of a contract is ambiguous is a question of law" that we review *de novo*. *Salvaggio v. New Breed Transfer Corp.*, 150 N.C. App. 688, 690, 564 S.E.2d 641, 643 (2002) (citation omitted).

## IV. Discussion

Defendants argue that the trial court erred by denying their motion to compel arbitration based upon its reasoning that (a) the relevant provisions were ambiguous regarding an agreement to arbitrate disputes or, alternatively, (b) that even an unambiguous arbitration agreement would have been unenforceable due to a fiduciary duty owed to decedent at the time the agreement was made.

We hold that the trial court did not err in denying defendants' motion. The findings of fact in its order are supported by competent evidence. These findings in turn support its legal conclusion that the arbitration agreement was ambiguous, and therefore defendants failed to meet the

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burden of proving the existence of an agreement to arbitrate between plaintiff and defendants at the time Ms. Lightner signed the documents at issue. Because this conclusion of law is supported, we do not reach the court's second ground for denying defendants' motion regarding the breach of a purported fiduciary duty owed by defendants.

A. Findings of Fact

In its order, the trial court found that defendants presented no evidence to refute the claims in Ms. Lightner's affidavit or otherwise support their contention that the parties had agreed to arbitrate. This finding is supported by the record. Defendants did not attach the arbitration agreement to their motion, furnish any affidavit supporting its existence or inclusion within the documents viewed and signed by Ms. Lightner, or even attempt to enter the document itself into evidence. The document itself was furnished by plaintiff as an exhibit to her memorandum opposing arbitration. The trial court also made findings accepting the version of events averred in Ms. Lightner's affidavit. Because they were supported by the affidavit, these findings are conclusive on appeal. *See Slaughter*, 162 N.C. App. at 461, 591 S.E.2d at 580.

The pages of the arbitration agreement preceding its signature page, which Ms. Lightner was not shown at the time of signing, detailed the requirements to arbitrate any dispute arising with Autumn Care. The signature page had headings reading "Resident and Facility Arbitration Agreement" and "Resident Understanding & Acknowledgement Regarding Arbitration" in small font, but made no further reference to the details of arbitration. It simply stated that "[t]he parties understand that by entering into this agreement the parties are giving up their constitutional right to have any claim decided in a court of law before a judge and a jury, as well as any appeal from a decision or award of damages."

The court found that, in contrast, the signature page of the admission agreement stated that the parties "mutually agree to irrevocably waive any and all rights to a trial by jury (while expressly preserving any and all rights to a bench trial)[.]" The court also found that the admission agreement contained a clause "incorporat[ing] into the Admission Agreement by reference: 'all documents [Ms. Lightner] signed or received in the Admission Packet during the admission process to the facility.'" These findings are also supported by the record evidence.

B. Conclusion of Law

Based on its findings concerning the aforementioned clauses in the materials presented to Ms. Lightner on the day she signed the relevant



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documents, as well as the version of events Ms. Lightner averred in her affidavit, the trial court found that “the Admission Agreement Signature Page and Resident and Facility Arbitration Agreement[ ] are internally in conflict with one another, one purporting to agree to expressly reserve the right to a bench trial and another purporting to agree to arbitration.” Furthermore, the court found that “Defendants’ use of the terms ‘jury trial’ and ‘bench trial’ within the same sentence [of the admission agreement’s signature page] would not give a reasonable person notice of arbitration and would not be understood by someone who does not have training in the interpretation of legal documents.” These findings are more appropriately read as a conclusion of law that no valid agreement to arbitrate was formed between the parties, due to an ambiguity regarding the right to have any dispute determined by a court of law. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (“[A]ny determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law.”) (internal citations omitted).

An ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties. Stated differently, a contract is ambiguous when the writing leaves it uncertain as to what the agreement was. The fact that a dispute has arisen as to the parties’ interpretation of the contract is some indication that the language of the contract is, at best, ambiguous.

*Salvaggio*, 150 N.C. App. at 690, 564 S.E.2d at 643 (internal quotation marks, alterations, and citations omitted). “[I]t is a fundamental rule of contract construction that the courts construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court is reasonably able to do so. Contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible.” *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 94, 414 S.E.2d 30, 34 (1992) (internal quotation marks, alterations, and citations omitted). Where no other reasonable, nonconflicting interpretation is possible, “the court is to construe the ambiguity against the drafter—the party responsible for choosing the questionable language.” *Novacare Orthotics & Prosthetics E., Inc. v. Speelman*, 137 N.C. App. 471, 476, 528 S.E.2d 918, 921 (2000) (citation omitted).

Defendants cite to *Rouse and Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 553 S.E.2d 84 (2001), arguing that similarities between the arbitration agreements and clauses governing litigation in those cases and the instant case compel a conclusion

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that their agreement with plaintiff to arbitrate disputes was unambiguous. We find these cases inapposite.

In *Internet East*, we held that a forum selection clause granting “courts of North Carolina . . . sole jurisdiction over any disputes” did not conflict with an arbitration clause in the same contract. *Id.* at 403, 553 S.E.2d at 86. We reasoned that the clauses could be read such that the “forum selection clause should . . . be triggered only when a court is needed to intervene for those judicial matters that arise from arbitration and when the parties have agreed to take a particular dispute to court instead of resolving it by arbitration.” *Id.* at 407, 553 S.E.2d at 88. Based upon similar reasoning, in *Rouse* our Supreme Court held that choice of law and consent to jurisdiction clauses did not conflict with an arbitration clause within the same contract. 331 N.C. at 94-97, 414 S.E.2d at 33-35.

Defendants argue that these cases support a nonconflicting reading of the admission agreement’s clause preserving the right to a bench trial and the arbitration agreement’s signature page waiving the right to bring disputes before a court of law. Defendants contend that these clauses should be interpreted such that arbitration of disputes is required, but “in the event of judicial intervention, the Admission Agreement stipulates that neither party would seek a jury trial, and instead, would seek a bench trial.” We are not persuaded. Unlike the forum selection, choice of law, and consent to jurisdiction clauses at issue in *Rouse* and *Internet East*, here the admission agreement’s clause expressly reserving the right to a bench trial cannot be read in harmony with the arbitration agreement’s clause expressly foreclosing the same. Given the trial court’s finding that the pages of the arbitration agreement providing all the details of the procedures for arbitration were not presented to Ms. Lightner when she signed its signature page, such an interpretation would be unreasonable.<sup>1</sup>

The dissent bases its argument in large part upon our precedent holding that parties to an arm’s length contractual agreement are charged with knowledge and understanding of the contents of documents they sign, when the parties could have reviewed the provisions from which they seek relief. *See, e.g., Leonard v. Power Co.*, 155 N.C.

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1. We also note that Part IV, Section K of the admission agreement provides that headings in the contract “are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.” Thus, the two references to “arbitration” in the headings on the arbitration agreement’s signature page are of no effect. The signature page thus fails to mention arbitration at all.

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10, 13-14, 70 S.E. 1061, 1064 (1911). This principle misses the point: The trial court found that Ms. Lightner was not presented with the contents of the arbitration agreement other than the signature page and, despite her requests, was unable to avail herself of full printed copies for review at the time she signed the contracts. Thus, this case is not one in which a party had constructive notice of and opportunity to review a contractual provision from which they seek relief. The facts of the instant case belie the dissent's reliance on this principle.<sup>2</sup>

The trial court found that Ms. Lightner was not presented with or able to review the contents of the arbitration agreement other than its signature page. The arbitration agreement's signature page provides no detail on the suggested methods of nonjudicial resolution of disputes between the parties. It fails to even mention arbitration. Rather, the signature page only provides that the parties waive the right to a trial. In contrast, the admission agreement expressly waives the right to a jury trial and reserves the right to a bench trial. Based upon these findings, the trial court correctly concluded that the parties' arbitration agreement was ambiguous as a matter of law. *See Novacare*, 137 N.C. App. at 476, 528 S.E.2d at 921 (construing contractual ambiguity against drafting party). Therefore, the trial court did not err by denying defendants' motion to compel arbitration.

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2. Furthermore, ignoring the fact that no objection was made below nor error raised on appeal, the dissent mistakenly suggests that the parol evidence rule would prohibit the trial court's consideration of Ms. Lightner's affidavit in determining issues of contract formation and ambiguity. The parol evidence rule is inapplicable to such determinations. *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 560, 681 S.E.2d 770, 774 (2009) ("[I]f the writing itself leaves it doubtful or uncertain as to what the agreement was, parol evidence is competent, not to contradict, but to show and make certain what was the real agreement between the parties.") (internal quotation marks and citation omitted); *Z.A. Sneed's Sons, Inc., v. ZP No. 116, L.L.C.*, 190 N.C. App. 90, 101, 660 S.E.2d 204, 211 (2008) ("Extrinsic evidence as to the circumstances under which a written instrument was made has been held to be admissible in ascertaining the parties' expressed intentions, subject to the limitation that extrinsic evidence is not admissible in order to give the terms of a written instrument a meaning of which they are not reasonably susceptible.") (internal quotation marks, alteration, and citation omitted); *Ingersoll v. Smith*, 184 N.C. App. 753, 755, 647 S.E.2d 141, 143 (2007) ("The parol evidence rule prohibits the admission of parol evidence to vary, add to, or contradict the terms of an integrated written agreement, though an ambiguous term may be explained or construed with the aid of parol evidence.") (internal quotation marks and citations omitted).

The dissent's implied invocation of the parol evidence rule to the circumstances of the instant case would have illogical and unjust consequences. Under its conception of the doctrine, once a party signs a written document, they are barred from contesting their lack of agreement to later-furnished, additional terms not within the document presented to them at the time of signing. Such an application of the parol evidence rule would invite fraud and upheave the well-settled jurisprudence of contract formation.

V. Conclusion

For the foregoing reasons, we affirm the trial court's order denying defendants' Motion to Compel Arbitration and Stay Proceedings.

AFFIRMED.

Judge BRYANT concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

The majority's opinion ignores fundamental principles and interpretation of contract law, disregards our nation's and our state's public policies in favor of arbitration, and misapplies the *de novo* standard of review to affirm the trial court's order. The trial court's order is properly reversed and remanded for entry of an order to stay the proceeding and to compel arbitration as the parties agreed. I respectfully dissent.

I. Standard of Review

Our review of the trial court's order and the Admission and Arbitration Agreements is *de novo*. Precedents governing our review of contracts are long established:

Because the law of contracts governs the issue of whether there exists an agreement to arbitrate, the party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes. The trial court's determination of whether a dispute is subject to arbitration is a conclusion of law reviewable *de novo*.

*T.M.C.S., Inc. v. Marco Contr'rs, Inc.*, 244 N.C. App. 330, 339, 780 S.E.2d 588, 595 (2015) (citations, alterations, and internal quotation marks omitted).

Our Supreme Court held:

[W]here the parties have deliberately put their engagements in writing in such terms as import a legal obligation free of uncertainty, it is presumed the writing was intended by the parties to represent all their engagements as to the elements dealt with in the writing. Accordingly, all prior and contemporaneous negotiations in respect to those elements are deemed merged in the written agreement. And the rule is that, in the absence of fraud or

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mistake or allegation thereof, parol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.

*Neal v. Marrone*, 239 N.C. 73, 77, 79 S.E.2d 239, 242 (1953) (citations omitted). More recently, this Court reiterated:

It is the general law of contracts that the purport of a written instrument is to be gathered from its four corners, and the four corners are to be ascertained from the language used in the instrument. When the language of the contract is clear and unambiguous, construction of the agreement is a matter of law for the court and the court cannot look beyond the terms of the contract to determine the intentions of the parties.

*Bank of Am., N.A. v. Rice*, 230 N.C. App. 450, 456, 750 S.E.2d 205, 209 (2013) (citation omitted).

## II. Existence of the Arbitration Agreement

Our Supreme Court has also held:

North Carolina has a strong public policy favoring the settlement of disputes by arbitration. Our strong public policy requires that the courts resolve any doubts concerning the scope of arbitrable issues in favor of arbitration. This is true whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

*Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992) (citation and internal quotation marks omitted). “A dispute can only be settled by arbitration if a valid arbitration agreement exists. The party seeking arbitration must show that the parties mutually agreed to arbitrate their disputes.” *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 419, 637 S.E.2d 551, 554 (citations omitted). “[A]ny doubt concerning the *existence* of such an agreement must also be resolved in favor of arbitration.” *Rouse*, 331 N.C. at 92, 414 S.E.2d at 32 (emphasis supplied).

This policy in favor of arbitration has also been codified as national policy in federal law. *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 785 (1983) (“any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration”);

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*Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 349 (4th Cir. 2001); *see also AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 179 L. Ed. 2d 742, 750 (2011) (explaining Congress enacted the Federal Arbitration Act “in 1925 in response to widespread judicial hostility to arbitration agreements”).

The majority’s opinion concludes Defendants failed to establish the existence of an Arbitration Agreement between the parties. Purportedly reviewing the agreements *de novo* and as a matter of law, the majority’s opinion affirms the trial court’s order and its erroneous conclusion of law that “the arbitration agreement was ambiguous, and therefore defendants failed to meet the burden of proving the existence of an agreement to arbitrate between plaintiff and defendants at the time Ms. Lightner signed the documents at issue.” This analysis does not confine itself to the four corners of the separate agreements and apply the plain language *de novo* as a matter of law. *See Bank of Am., N.A.*, 230 N.C. App. at 456, 750 S.E.2d at 209.

This conclusion is also unsupported by the four corners of the written agreements. The trial court neither disputes nor concludes the proffered and admitted evidence is invalid or insufficient to prove the Arbitration Agreement. If it had, the Admission Agreement and the asserted “non-existent” Arbitration Agreement could not be “internally in conflict with one another.”

Here, Plaintiff submitted all the evidence needed to prove not only the existence of, but also mutual assent between the parties to, the Arbitration Agreement. This agreement is separate and distinct from the Admission Agreement. Plaintiff submitted into evidence the Admission Agreement and the Arbitration Agreement, signed by Lightner as Decedent’s authorized representative, along with her affidavit.

The Arbitration Agreement contains multiple pages. Lightner avers several pages were never been shown to her. Even if so, the signature page of the Arbitration Agreement, which is admittedly signed by Lightner as Decedent’s representative, agrees to arbitration as the exclusive forum to resolve any disputes arising between the parties and contains a complete waiver of the right to trial by judge and a jury in a court of law. It also states and admonishes the signatory prior to signing: **“NOT A CONDITION OF ADMISSION – READ CAREFULLY.”**

Our Supreme Court held over one hundred years ago that, “the law will not relieve one who can read and write from liability upon a written contract, upon the ground that he did not understand the purport of the writing, or that he has made an improvident contract, when he could

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inform himself and has not done so.” *Leonard v. Power Co.*, 155 N.C. 10, 14, 70 S.E. 1061, 1063 (1911).

“The interpretation of the terms of an arbitration agreement are governed by contract principles and parties may specify by contract the rules under which arbitration will be conducted. Persons entering contracts have a duty to read them and ordinarily are charged with knowledge of their contents.” *Raper*, 180 N.C. App. at 420-21, 637 S.E.2d at 555 (citations, alterations, and internal quotation marks omitted).

Once the documents are signed, any events preceding the execution and signatures are merged into the final document, which becomes the final expression of the parties’ intent. *Neal*, 239 N.C. at 77, 79 S.E.2d at 242. “[P]arol testimony of prior or contemporaneous negotiations or conversations inconsistent with the writing, or which tend to substitute a new and different contract from the one evidenced by the writing, is incompetent.” *Id.*

The majority’s opinion asserts the parol evidence rule is inapplicable to the issue in this case, and claims “no objection was made below nor error raised on appeal.” Defendant’s appeal challenges and brings all of the trial court’s conclusions of law, which fail to enforce the parties’ two separate, distinct, written, and executed contracts, before us for *de novo* review. Both agreements were executed by the same parties, at the same time, at the same place. Defendant provided performance and Plaintiff accepted the benefits and burdens under both agreements.

The four corners of the documents are properly before us in reviewing the trial court’s order failing to enforce the agreements. Plaintiff has asserted none of the traditional contract defenses, e.g., forgery, fraud, duress, incapacity, or unconscionability, to excuse enforcement of the express agreements her decedent’s representative admittedly signed. The denial of the parties’ agreed-upon forum of arbitration and the *de novo* proper construction of these agreements is clearly before us.

In *Evangelistic Outreach Ctr. v. General Steel Corp.*, 181 N.C. App. 723, 726, 640 S.E.2d 840, 843 (2007), the proponent of the alleged arbitration agreement submitted in its unverified motion a one-page purchase order signed by the party to be charged, which noted the agreement was subject to the terms and conditions on its face and on the reverse side. The proponent also submitted a copy of the reverse side, which contained an arbitration clause. *Id.*

The party opposing arbitration submitted a verified response denying receipt of the reverse side. *Id.* at 727, 640 S.E.2d at 843. Both parties



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submitted affidavits in support of their positions. *Id.* at 726-27, 640 S.E.2d at 843. This Court upheld the trial court's conclusion that "proof of the very *existence* of an arbitration agreement was lacking." *Id.* at 727, 640 S.E.2d at 843 (emphasis original). The reasoning in that case is inapplicable to the admitted facts and plain meanings of the provisions before us.

Plaintiff submitted all the evidence needed to prove the existence of, her signature on, and the parties' mutual assent to the Arbitration Agreement, which is separate and distinct from the Admission Agreement. The law will enforce agreements as written and signed. Plaintiff is not relieved from liability upon a written contract, upon allegation Lightner did not read or "understand the purport of the writing" when she could have informed herself and failed to do so, or simply have refused to sign the Arbitration Agreement without jeopardizing her mother's admission to the Facility. *See Leonard*, 155 N.C. at 14, 70 S.E. at 1063.

Parties to private contracts are free to set forth, demand, and enforce the time, place, and type of forum where disputes between the parties are to be resolved. *See Rouse*, 331 N.C. at 92, 414 S.E.2d at 32. Nothing in our law requires or compels that choice to be a judicial or even a public forum, or to include all options or remedies available in that public or private forum. *See id.* Sufficient evidence shows an express Arbitration Agreement exists, signed by Decedent's representation and Defendants while Decedent was present, which she was free to reject without risking her non-admission to the Facility. Plaintiff cannot successfully argue she is not bound by terms stated on the very page Decedent's representative admittedly signed with her mother present. *See Leonard*, 155 N.C. at 14, 70 S.E. at 1063.

### III. Construing the Agreements

#### A. "Internally in Conflict"

The trial court concluded and the majority's opinion agrees, the separate and distinct Admission Agreement and the Arbitration Agreement were "internally in conflict with one another." The Admission Agreement preserves the right to a bench trial to the parties, but waives both parties' right to a trial by jury and to punitive damages. The Arbitration Agreement is separate from the Admission Agreement and declares arbitration to be the exclusive and mandatory method for dispute resolution between the parties and waives both parties' constitutional rights to a bench trial before a judge and a trial by jury.



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The Admission Agreement provides, in pertinent part:

The Resident/Representative and Facility hereby mutually agree to irrevocably waive any and all rights to trial by jury (while expressly preserving any and all rights to a bench trial) and forego any and all rights to claim for punitive damages in any action or proceeding arising out of or relating to this agreement, the transactions relating to its subject matter, or care and treatment provided to Resident at Facility. This agreement does not limit the ability of the Resident/Representative from filing formal and informal grievances with the Facility or state or federal government, including the right to challenge a proposed transfer or discharge.

Significantly, this condition and waiver is also stated on the page where Lightner, as Decedent's authorized representative, and Defendants' representative signed the Agreement for Decedent to be admitted. The Admission Agreement also incorporates by reference "all documents that You signed or received in the Admission Packet during the admission process to [the] FACILITY."

On and near the bottom of the signature page, the Arbitration Agreement in bolded, capitalized, and italicized text provides in pertinent part:

***THE PARTIES UNDERSTAND THAT BY ENTERING INTO THIS AGREEMENT, THE PARTIES ARE GIVING UP THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES.***

In *Rouse*, our Supreme Court considered and rejected an argument asserting a consent-to-jurisdiction clause and an arbitration clause in a single construction contract were "in irreconcilable conflict, as they both purport to establish the exclusive forum for resolution of disputes arising under the contract." *Rouse*, 331 N.C. at 92, 414 S.E.2d at 33. Our Supreme Court reasoned the parties had agreed to arbitrate any disagreement arising out of the contract, and the contractor had consented to the jurisdiction of North Carolina courts in the event of any litigation to enforce either the arbitration agreement or an award resulting from arbitration. *Id.* at 96-97, 414 S.E.2d at 35.

This Court has similarly construed the forum selection and arbitration clauses contained in a single contract to avoid conflict and asserted

ambiguity between those provisions. See *Internet East, Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 407, 553 S.E.2d 84, 88 (2001) (“The forum selection clause should be read to be triggered only when a court is needed to intervene for those judicial matters that arise from arbitration and when the parties have agreed to take a particular dispute to court instead of resolving it by arbitration.”); see also *Tomaszewski v. St. Albans Operating Co., LLC*, No. 2:18-CV-01327, 2018 WL 5819601, at \*4 (S.D. W. Va. Nov. 6, 2018) (an arbitration agreement “only changes the forum of the lawsuit.”).

The majority’s opinion disagrees with and fails to apply these precedents, and also fails to offer any factors or cases to distinguish them. The reasoning and precedents in *Neal*, *Leonard*, *Raper*, *Rouse*, and *Internet East* express and exhort how we are to review, construe, apply, and enforce the separate contracts before us.

Presuming the provisions contained in the separate agreements are ambiguous, the Admission Agreement and Arbitration Agreement may also be harmonized as were the provisions contained in a single contract in those precedents. The Admission Agreement expressly reserves both parties’ right to a bench trial to adjudicate disputes, but excludes trial by jury and the recovery of punitive damages in the absence of an agreement to arbitrate.

#### B. Not a Condition of Admission

Defendants also assert an additional and equally harmonious reading of the two provisions in their appellate brief. The Arbitration Agreement clearly and emphatically states across the top of each page, including its signature page, that it is “**NOT A CONDITION OF ADMISSION – READ CAREFULLY**.” Defendants argue the bench trial clause in the Admission Agreement simply applies if Decedent’s authorized representative had rejected and declined to execute the Arbitration Agreement. Rejecting the Arbitration Agreement was without risk to Decedent’s admission to the Facility.

Our Supreme Court has re-stated the “fundamental rule of contract construction that the courts construe an ambiguous contract in a manner that gives effect to all of its provisions, if the court is reasonably able to do so. Contract provisions should not be construed as conflicting unless no other reasonable interpretation is possible.” *Rouse*, 331 N.C. at 94, 414 S.E.2d at 34 (citations, alterations, and internal quotation marks omitted).

The majority’s opinion asserts without citing support, “the admission agreement’s clause expressly reserving the right to a bench trial

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cannot be read in harmony with the arbitration agreement's clause expressly foreclosing the same." This conclusion is erroneous and does not follow the precedents set forth by our Supreme Court in *Rouse* and this Court in *Internet East*.

Decedent, through her authorized representative, expressly agreed to arbitration as the forum to resolve disputes between the parties. Defendants exercised their statutorily and contractually guaranteed right to have the parties' disputes resolved through arbitration. The trial court erred in denying Defendants' motion to compel arbitration and to stay the proceedings. See *Rouse*, 331 N.C. at 96-97, 414 S.E.2d at 35; *Internet East*, 146 N.C. App. at 407, 553 S.E.2d at 88. The trial court's unlawful order is properly reversed and remanded for entry of an order to compel arbitration as agreed and to stay proceedings pursuant to the Arbitration Agreement.

IV. Fiduciary Duty to Decedent

The majority's opinion fails to address Defendants' second asserted error in the trial court's order. The trial court also apparently concluded Defendants owed a fiduciary duty of specialized care to Decedent.

For a breach of fiduciary duty to exist, there must first be a fiduciary relationship between the parties. . . . In general terms, a fiduciary relation is said to exist wherever confidence on one side results in superiority and influence on the other side; where a special confidence is reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing the confidence.

*King v. Bryant*, 369 N.C. 451, 464, 795 S.E.2d 340, 348-49 (citations, alterations, and internal quotation marks omitted), *cert. denied*, \_\_ U.S. \_\_, 199 L. Ed. 2d 233 (2017).

This Court recently stated: "North Carolina recognizes two types of fiduciary relationships: *de jure*, or those imposed by operation of law, and *de facto*, or those arising from the particular facts and circumstances constituting and surrounding the relationship." *Hager v. Smithfield E. Health Holdings, LLC*, \_\_ N.C. App. \_\_, \_\_, 826 S.E.2d 567, 571, *disc. review denied*, 373 N.C. 253, 835 S.E.2d 446 (2019) (citation omitted). Although the trial court's order is unclear upon which basis it ruled, the only reasonable conclusion from the order is it concluded a *de facto* fiduciary relationship existed between Decedent and Defendants.

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Our Supreme Court stated: “The list of relationships that we have held to be fiduciary in their very nature is a limited one, and we do not add to it lightly.” *CommScope Credit Union v. Butler & Burke, LLP*, 369 N.C. 48, 52, 790 S.E.2d 657, 660 (2016) (citation omitted). The physician-patient relationship is among the recognized *de jure* fiduciary relationships. *Hager*, \_\_ N.C. App. at \_\_, 826 S.E.2d at 572 (citing *Black v. Littlejohn*, 312 N.C. 626, 646, 325 S.E.2d 469, 482 (1985)).

This Court in *Hager* considered and rejected expanding a fiduciary duty “to include assisted living facilities with memory wards and their residents, as licensed memory wards possess special knowledge and skill concerning the care of those afflicted with cognitive impairments.” *Id.* (citation, alteration, and internal quotation marks omitted).

This Court then considered whether a *de facto* fiduciary relationship existed. *Id.* Our Supreme Court’s fact-specific analysis in *King* was reviewed for guidance. *Id.* In *King*, our Supreme Court concluded a *de facto* fiduciary physician-patient relationship existed because the patient:

(1) was referred to the surgeon by his primary care physician, who already had a *de jure* fiduciary duty to the patient; (2) sought out the surgeon for his specialized skill and knowledge; (3) provided the surgeon with confidential information on arrival and prior to being seen; and (4) had received a limited education and had little to no experience interpreting legal documents.

*Id.* at \_\_, 826 S.E.2d at 573 (citations and footnote omitted).

This Court in *Hager* applied the analysis from *King* to the facts before it. Significantly, in considering the fourth factor, the patient in *Hager*:

was not asked to sign the Arbitration Agreement before she could evaluate the care offered by [the facility]; prior to signing the agreement, she toured the facility and was provided the opportunity to ask questions. She signed the agreement after assessing the facility with her friend . . . who also had the opportunity to offer her independent thoughts on the facility.

*Id.*

The Arbitration Agreement in this case is essentially identical to the one this Court upheld in *Hager*. See *id.* at \_\_, 826 S.E.2d at 570. Both agreements contain the same capitalized, bolded, and italicized waiver of

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the right to trial by judge and jury, as well as the same bolded and underlined admonishment across the top of the page: “**NOT A CONDITION OF ADMISSION — READ CAREFULLY**”. *Id.*

This Court in *Hager* concluded the language of these agreements “outlined the nature of arbitration, identified the rights [the patient] was relinquishing, and encouraged [his representative] to seek the advice of legal counsel before signing.” *Id.* at \_\_\_, 826 S.E.2d at 574.

The analysis in *Hager* is on point. As Decedent’s condition debilitated, she required *more* specialized care than available at her previous assisted living residence. Her daughter was referred by a worker at that previous facility to the Facility for this higher specialized care. Like in *Hager*, Decedent’s representative had the opportunity to and did perform her own due diligence by touring the Facility. In fact, Lightner had far *more* opportunity to perform her own due diligence than the patient’s representative in *Hager*. Lightner toured the Facility a week before returning with Decedent, while the representative in *Hager* admitted her patient the same day following the tour. *Id.* at \_\_\_, 826 S.E.2d at 569.

Considering both *Hager* and the factors our Supreme Court laid out in *King*, these facts align to those in *Hager*, which rejected any fiduciary duty. Defendants did not maintain or violate any fiduciary duty owed to Decedent. The trial court erred in concluding a fiduciary relationship existed between Decedent and Defendants.

### V. Conclusion

Plaintiff submitted evidence of an express and mutual Arbitration Agreement, signed by Defendants and Decedent’s authorized representative. The law will not relieve Plaintiff from her agreements, and the courts will enforce and compel her to honor and perform her obligations in a binding written contract. Plaintiff does not allege or show she did not understand the purport of the writing or, even if so, that she could not have informed herself prior to signing. *See Leonard*, 155 N.C. at 14, 70 S.E. at 1063.

By failing to apply four corners and *de novo* review as a matter of law, the majority’s opinion erroneously construes the Admission Agreement and the separate Arbitration Agreement to be “internally in conflict with one another.” This conclusion is: (1) contrary to the express terms of the parties’ separate and private contracts; (2) contrary to the clear public policy of our nation and North Carolina favoring arbitration; and, (3) contrary to the fundamental rule of interpretation to avoid construing

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contract provisions as conflicting, unless no other reasonable interpretation can be applied.

The trial court also erred in concluding as a matter of law that a fiduciary relationship existed between Defendants and Decedent or her representative at admission. *See Hager*, \_\_ N.C. App at \_\_, 826 S.E.2d at 574. The trial court further erred by concluding as a matter of law Defendants had violated any fiduciary duty of care at the pre-admission relationship.

The parties are contractually and lawfully bound, and Defendants are entitled to resolve the parties' disputes through the forum of arbitration as agreed. It is the duty of this Court to enforce the parties' private agreements. The trial court's erroneous order is properly reversed and remanded for entry of an order to compel arbitration and stay the proceedings. I respectfully dissent.

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IN THE MATTER OF C.N., A.N.

No. COA18-1031-2

Filed 21 April 2020

**Termination of Parental Rights—grounds for termination—  
neglect—probability of future neglect**

In a termination of parental rights case, the Court of Appeals reconsidered its prior opinion in light of recent Supreme Court decisions and once again determined the evidence and findings were insufficient to support conclusions that respondent-mother's actions constituted ongoing neglect or forecast a likelihood of repetition of neglect, or that respondent failed to make reasonable progress, where respondent acknowledged responsibility for the conditions that led to the removal of her children and took numerous steps to improve those conditions and become a better parent.

Appeal by respondent from order entered 3 July 2018 by Judge J. H. Corpening II in New Hanover County District Court. This case was originally heard in the Court of Appeals 27 June 2019. *In re C.N., A.N.*, \_\_ N.C. App. \_\_, 831 S.E.2d 878 (2019). Upon remand from the Supreme Court of North Carolina.

*No brief filed for petitioner-appellee New Hanover County Department of Social Services.*

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*Mary McCullers Reece for respondent-appellant mother.*

*Womble Bond Dickinson (US) LLP, by Jessica Gorczynski, for guardian ad litem.*

TYSON, Judge.

The Supreme Court of North Carolina remanded this case for this Court “to reconsider its holding in light of *In re B.O.A.*, 372 N.C. 372, 831 S.E.2d 305 (2019) and *In re D.W.P. and B.A.L.P.*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d. \_\_\_ (2020).” We have reviewed both decisions as analyzed herein, and hold these opinions, together or individually, do not change or affect this Court’s the earlier mandate.

I. Factual and Procedural Background

The facts underlying the petition and adjudication to terminate Respondent-mother’s parental rights are fully set forth in this Court’s opinion in *In re C.N., A.N.*, \_\_\_ N.C. App. \_\_\_, 831 S.E.2d 878 (2019). The pertinent facts and procedural background are set out below.

During May 2016, the New Hanover County Department of Social Services (“DSS”) received a report that Respondent-mother’s minor daughter “Anne” was found wandering alone behind a store on Carolina Beach Road in New Hanover County. *See* N.C. R. App. P. 42(b) (pseudonyms are used to protect the identity of the juveniles).

On or about 28 June 2016, Respondent-mother called 911. Respondent-mother reported her other minor daughter, “Carrie,” had pulled up on a table and spilled an open bottle of Mr. Clean liquid detergent onto herself. EMS and law enforcement, who responded to the 911 call, reported conditions inside the home were dirty and in poor shape. Carrie was treated for corneal abrasions and chemical burns on her tongue.

DSS obtained nonsecure custody of eleven-month-old Carrie and two-year-old Anne and filed a juvenile petition alleging they were neglected juveniles. Respondent-mother stipulated to the allegations that Carrie and Anne were neglected, on the basis they did not receive proper care, supervision, or discipline, and lived in an environment injurious to their welfare, in the juvenile petition at the adjudication hearing. The trial court adjudicated Carrie and Anne to be neglected juveniles based upon Respondent-mother’s stipulation.

On 8 February 2018, DSS filed a petition to terminate Respondent-mother’s parental rights to Carrie and Anne. DSS alleged the following

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grounds for termination of Respondent-mother's parental rights: neglect and willful failure to make reasonable progress. The petition was heard on 23 and 26 April 2018.

The trial court made the following findings of fact:

3. . . . Both children have been in the legal custody of [DSS] since June 28, 2016, were residing in a kinship placement with a maternal aunt and have currently been residing with licensed foster parents since being placed in an out of home placement.

. . . .

10. That [Carrie] and [Anne] were adjudicated neglected Juveniles within the meaning of G.S. 7B-101(15) at a hearing held on August 24, 2016 where Respondent-Parents stipulated to the allegations in the petition. Respondent-Mother was ordered to comply with her Case Plan; obtain and maintain stable income and housing; submit to a substance abuse assessment and to comply with all recommendations; complete a mental health assessment and comply with all recommendations; successfully complete parenting classes; and participate in random drug screens.

. . . .

11. That from June 2016 through February 2018 Respondent-Mother demonstrated a pattern of instability in housing and income. She has lived with several different boyfriends within New Hanover and Bladen County and earns income by cleaning houses and selling things on eBay. For the past year, Respondent-Mother has primarily resided with a boyfriend in Carolina Beach. She is financially dependent on her boyfriend for transportation, income and housing. Respondent-Mother has been inconsistent with her communication with [DSS], has not provided a current, working telephone number, has not provided an email address, does not return phone calls, has missed appointments and was not engaged when she did attend. [DSS] has provided her with bus passes and offered individual transportation. Respondent-Mother completed her substance abuse assessment but not the recommended treatment consisting of intensive out-patient, community support, 12 step program, individual therapy, skill set, SAIOP, after care and relapse



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prevention. Respondent-Mother started to participate in her treatment plan then elected to detox at home in August 2016. She disengaged with services, moved from her service area, and then sporadically re-engaged with services in early 2018. She accessed mental health treatment in August 2017 and out-patient therapy was recommended to help her cope with her depressive order, ADHD, alcohol and Opioid use. Respondent-Mother self-reports that she “has so much going on”, that she has depression and runs from or ignores her problems, copes with it by sleeping for days and not eating. She stopped attending classes at Coastal Horizons because she “thought they were a joke” and would have enrolled in substance abuse treatment if she thought it was important. Respondent-Mother completed her parenting classes and participated in 13 out of 38 drug screen requests with mixed negative and positive results for benzodiazepines and amphetamines. During a home visit, Respondent-Mother was unable to account for her missing medication and thought she may have taken extra. Respondent-Mother had multiple phone issues during the underlying matter. Her boyfriend pays for her phone and has taken it from her when she texted someone else. Respondent-Mother and her boyfriend have broken up a few times over the past year when she texts other people. To date, Respondent-Mother has not been consistent with any treatment, is not compliant with her case plan and re-engaged in some services at lunch time on the first day of this hearing.

....

15. . . . Respondent-Mother was late to visits in November 2017 and December 2017 and did not notify anyone when she did not attend visits in August 2017, September 2017, January 2018, and March 2018. When visits with Respondent-Mother occurred, she would bring snacks and gifts for the children and interact appropriately with the children.

The trial court found grounds of neglect and willful failure to make reasonable progress existed to terminate Respondent-mother’s parental rights. The trial court concluded Carrie and Anne’s best interests required termination of Respondent-mother’s parental rights in an order entered 3 July 2018. Respondent-mother timely appealed.

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When initially reviewed on appeal, this Court unanimously held the evidence presented and the trial court's findings were insufficient to support the conclusion that Respondent-mother's "neglect is ongoing, and there is a probability of repetition of neglect." We further concluded DSS' evidence failed to show Respondent-mother had failed to make reasonable progress to support the conclusion to terminate her parental rights on this ground.

II. *In re B.O.A.*

In the case of *In re B.O.A.*, the Supreme Court of North Carolina held that the respondent-mother's parental rights were subject to termination on the ground that she had failed to make reasonable progress in correcting the conditions that led to her daughter's removal from her home pursuant to N.C. Gen. Stat. §7B-1111(a)(2). *In re B.O.A.*, 372 N.C. at 373, 831 S.E.2d at 306.

In that case, "Bev" had been removed from her mother's home after local law enforcement had responded to the respondent-mother's call for assistance due to assaultive behavior by Bev's father and a "lengthy bruise" was discovered on Bev's arm. *Id.* at 373, 831 S.E.2d at 307. After a hearing, Bev was adjudicated neglected and the respondent-mother was required to comply with a case plan. *Id.* at 374, 831 S.E.2d at 307.

The case plan included requirements that respondent-mother: "obtain a mental health assessment; complete domestic violence counseling and avoid situations involving domestic violence; complete a parenting class and utilize the skills learned in the class during visits with the child; remain drug-free; submit to random drug screenings; participate in weekly substance abuse group therapy meetings; continue to attend medication management sessions; refrain from engaging in criminal activity; and maintain stable income for at least three months." *Id.* at 373-74, 831 S.E.2d 307.

Eventually, DSS petitioned to terminate the respondent-mother's parental rights. In the termination order, the trial court made findings, which included that the respondent-mother had not demonstrated the skills she was to learn in her domestic violence class. The trial court found "[i]n the last six months, [respondent-mother] has called the police on her live-in boyfriend and father of her new born child," and that she had "not remained free of controlled substances, and has continued to test positive for controlled substances (even during her recent pregnancy)." *Id.* at 374-75, 831 S.E.2d 307. The trial court further found the respondent-mother had declined a visit with her child, was hostile towards her social worker, revoked her consent to allow DSS access to

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her mental health records, and told the trial court that she “could pass the Bar today.” *Id.* at 375-76, 831 S.E.2d 308.

Here, the evidence and the findings support the conclusion that Respondent-mother made progress on her case plan. Respondent-mother’s progress is in contrast the respondent-mother’s behaviors and lack of progress in *In re B.O.A.* Further, our Supreme Court held in *In re B.O.A.* that this Court had adopted a restrictive construction of N.C. Gen. Stat. § 7B-1111(a)(2) in defining the conditions which led to a juvenile’s removal. *Id.* at 385, 831 S.E.2d at 314.

In the present case, the panel of this Court reviewing the trial court’s order properly reviewed the facts as found on the evidence presented and determined they were insufficient to support conclusions to satisfy the statutory definitions of neglect and failure to make reasonable progress to terminate Respondent-mother’s parental rights. This Court’s prior decision contained no “restricted” reading of the conditions which led to Carrie and Anne’s removal. *Id.* The background, analysis, and conclusions in *In re B.O.A.* are distinct from and not controlling of the present case.

III. *In re D.W.P.*

This Court was also directed to review and reconsider our holding in light of *In re D.W.P.*, \_\_\_ N.C. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2020 WL 967615 (2020). In this recent case, our Supreme Court affirmed the trial court’s termination of a respondent-mother’s parental rights based upon her lack of reasonable progress to remedy the conditions that led to the removal of her children. \_\_\_ N.C. at \_\_\_, \_\_\_ S.E.2d at \_\_\_, 2020 WL 967615, at \*1.

In *In re D.W.P.*, our Supreme Court recognized that the trial court’s order relied upon the following:

past abuse and neglect; failure to provide a credible explanation for [the child’s] injuries; respondent-mother’s discontinuance of therapy; respondent-mother’s failure to complete a psychiatric evaluation; respondent-mother’s violation of the conditions of her probation; the home environment of domestic violence; respondent-mother’s concealment of her marriage from GCDHHS; and respondent-mother’s refusal to provide an explanation for or accept responsibility for [the child’s] injuries.

\_\_\_ N.C.at \_\_\_, \_\_\_ S.E.2d at \_\_\_, 2020 WL 967615, at \*8.

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The Supreme Court also recognized the respondent-mother had made some progress in completing her plan, but indicated the findings showed she had been “unable to recognize and break patterns of abuse that put her children at risk.” *Id.* The Court stated it was “troubled by [the respondent-mother’s] continued failure to acknowledge the likely cause of [the child’s] injuries.” *Id.*

The facts of the present case are inapposite to those of *In re D.W.P.* Nothing indicates Respondent-mother has continued to place her children at risk or failed to acknowledge her neglect was the cause of the initial injury to Carrie and the instance of lack of supervision of Anne. Respondent-mother stipulated to the allegations that Carrie and Anne were neglected, in that they did not receive proper care, supervision, or discipline, and lived in an environment injurious to their welfare, in the juvenile petition at adjudication.

In the order remanding this case for further consideration, our Supreme Court cited *In re D.W.P.*, and noted “the need for a court to review all applicable evidence, including historical facts and evidence of changed conditions to evaluate the probability of future neglect.” We conclude no evidence or findings show the “neglect is ongoing, and there is a probability of repetition of neglect,” or Respondent-mother’s failure to make “reasonable progress.” We reaffirm the analysis and reasoning, as extended herein, and result reached in our earlier opinion to reverse and remand.

#### IV. Conclusion

Respondent-mother completed a parenting class, completed her substance abuse assessment, participated in individual therapy sessions to address her mental health, had re-engaged in treatment, was employed, submitted to drug testing, had established more reliable communications with DSS, had obtained stable housing and transportation to become a better parent, and showed reasonable progress to reduce or remove the likelihood of future neglect.

Respondent-mother’s minor daughters were removed from her care after the youngest child had spilled Mr. Clean onto herself and Respondent-mother had immediately sought medical assistance. No evidence shows and the trial court made no finding indicating either Respondent-mother had denied responsibility or a probability that her actions were likely to be repeated. *See In re D.W.P.*, \_\_\_ N.C. at \_\_\_, \_\_\_ S.E.2d at \_\_\_, 2020 WL 967615, at \*8; *In re B.O.A.*, 372 N.C. at 373, 831 S.E.2d at 306. The evidence and the trial court’s findings support the opposite conclusion.

## IN RE EST. OF WORLEY

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The trial court's order terminating Respondent-mother's parental rights is reversed and remanded to the trial court for disposition in accordance with the opinion and mandate of this Court filed 6 August 2019. *It is so ordered.*

REVERSED AND REMANDED.

Judges DILLON and BERGER concur.

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IN THE MATTER OF THE ESTATE OF PAUL WILLIAM MALLIE WORLEY,  
A/K/A PAUL WORLEY, DECEASED. BRENDA WORLEY MOSS, BARBARA WORLEY INGLE,  
AND LESTER WORLEY, PETITIONERS  
v.  
PATRICIA SPROUSE, DARLENE WATERS, LAVONDA GRIFFIN, DANNY MATHIS,  
AND JORDAN HAWKINS, RESPONDENTS

No. COA19-345

Filed 21 April 2020

**1. Estates—jurisdiction—transfer to superior court—section 28A-2A-7(b)—validity of will**

In an estate proceeding where decedent's siblings sought an order revoking probate of a holographic document submitted by decedent's long-time companion, the clerk of court properly dismissed the action for lack of jurisdiction pursuant to N.C.G.S. § 28A-2A-7(b)—therefore requiring the siblings to appeal to superior court—because the siblings' petition raised the issue of *devisavit vel non* (by arguing the submitted document was not decedent's will).

**2. Estates—probate—holographic document—testamentary intent—issue of material fact**

In an estate proceeding filed by decedent's siblings to revoke probate of a holographic document submitted by decedent's long-time companion titled "Last Will" and giving the companion "power of attorney" over all of decedent's possessions, the superior court erred by determining the document lacked testamentary intent as a matter of law where the document's language was sufficiently ambiguous to create a genuine issue of material fact regarding whether the document was meant to effectuate a transfer of property upon decedent's death and therefore constituted decedent's will.

## IN RE EST. OF WORLEY

[271 N.C. App. 27 (2020)]

Appeal by Respondents from order entered 5 December 2018 by Judge Bradley B. Letts in Buncombe County Superior Court. Heard in the Court of Appeals 16 October 2019.

*Long, Parker, Payne, Anderson & McClellan, P.A., by Ronald K. Payne and Thomas K. McClellan, for Petitioner-Appellee.*

*Frank G. Queen, PLLC, by Frank G. Queen, and Smathers & Smathers, by Patrick U. Smathers, for Respondent-Appellant.*

DILLON, Judge.

This matter concerns the estate of Paul Worley, who died in 2017 unmarried and without lineal descendants. Respondent Patricia Sprouse (“Ms. Sprouse” or “Pat”), Mr. Worley’s long-time companion, offered a certain document for probate which she contends is Mr. Worley’s will and which leaves her his entire estate. She appeals the Superior Court’s order concluding that this document “does not constitute a Last Will and Testament of [Mr. Worley]” and revoking the Certificate of Probate and Order Authorizing Issuance of Letters. After careful review, we vacate this order and remand for further proceedings.

### I. Background

Mr. Worley died on 14 January 2017. He had no spouse or children but was survived by three of his four siblings.

Petitioners are Mr. Worley’s three surviving siblings (the “Siblings”). Ms. Sprouse is Mr. Worley’s alleged partner for the last thirty-six (36) years of Mr. Worley’s life. The other Respondents are the descendants of Mr. Worley’s sibling who predeceased him.

Following Mr. Worley’s death, Ms. Sprouse offered a short document for probate, a document which purports to be in Mr. Worley’s handwriting, which read:

March 13, 2001

Last Will of Paul Worley:

I want Pat [Sprouse] to have the power of attorney of all that I own. That means land, cars, money, guns, clothing and anything else!

I don’t want Grace Price Worley to have none.

## IN RE EST. OF WORLEY

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Signed March 13, 2001 9:00pm

Paul Worley

(This document is hereinafter referred to as the “Holographic Document.”)<sup>1</sup>

The Clerk admitted the Holographic Document to probate. However, while the matter was pending before the Clerk, the Siblings filed a petition, commencing an estate proceeding, seeking an order revoking the probate of the Holographic Document. In their petition, the Siblings contended that the Holographic Document is not Mr. Worley’s will. All interested parties were served in accordance with Rule 4 of our Rules of Civil Procedure. *See* N.C. Gen. Stat. § 28A-2-6(a) (2017).

After a hearing on the matter, the Clerk dismissed the Siblings’ petition, concluding that she lacked subject-matter jurisdiction to determine whether the language in the Holographic Document exhibits testamentary intent. The Clerk’s dismissal order was appealed to the Superior Court.

After a hearing on the matter, the Superior Court concluded that the Holographic Document was not Mr. Worley’s will and directed the Clerk on remand to revoke probate of the Holographic Document.

Ms. Sprouse timely appealed that order to this Court.

## II. Analysis

The Superior Court held, as a matter of law, that the Holographic Document was not Mr. Worley’s last will because it “makes no testamentary disposition of [Mr. Worley’s] property [but] merely appoints [Ms.] Sprouse as Power of Attorney,” an appointment which lost all effect upon Mr. Worley’s death.

This appeal raises a number of interesting issues. We address these issues in turn below.

### A. Clerk’s Jurisdiction vs. Superior Court’s Jurisdiction

**[1]** The parties raise issues concerning the respective jurisdictions of the Clerk and of the Superior Court in considering the Siblings’ petition to revoke probate. For the following reasons, we conclude that the Clerk properly determined that she lacked jurisdiction and that the matter was properly brought up before the Superior Court.

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1. The phrase “Witness by Carolyn S. Surret” in another’s handwriting appears below Paul Worley’s purported signature.

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In some estate proceedings, there is no dispute as to the validity of the document offered to probate as being the will of the decedent. Rather, in those proceedings, the dispute concerns the interpretation of the will.

But in other estate proceedings, interested parties dispute the testamentary value of the document being offered for probate. In such cases, the matter must be transferred to Superior Court to resolve whether the document is, in fact, the will of the decedent. Specifically, our General Assembly directs that “[u]pon the filing of a caveat *or raising of an issue of devisavit vel non*, the clerk shall transfer the cause to the superior court, and the matter shall be heard as a caveat proceeding.” N.C. Gen. Stat. § 28A-2A-7(b) (emphasis added).

“*Devisavit vel non*” is a Latin phrase meaning “he devises or not,” *In re Estate of Pickelsimer*, 242 N.C. App. 582, 587, 776 S.E.2d 216, 219 (2015), and, when invoked, raises an issue “of whether or not the decedent made a will and, if so, whether [the document] before the court is that will.” *In re Will of Hester*, 320 N.C. 738, 745, 360 S.E.2d 801, 806 (1987).

In this matter, the Siblings did not file a formal caveat with the Clerk. However, they did otherwise raise the issue of *devisavit vel non* in their petition, contending that the Holographic Document is not Mr. Worley’s will. Therefore, since the Siblings raised the issue of *devisavit vel non* in their petition, the Clerk was correct in concluding that she lacked jurisdiction to decide the issue, and the matter was properly brought before the Superior Court.

B. Superior Court’s Exercise of Jurisdiction in Deciding  
Testamentary Intent

**[2]** Having determined that the matter was properly before the Superior Court, we now address whether that Court properly determined, *as a matter of law*, that the Holographic Document should not be probated, without submitting any issue to a jury. As explained below, we conclude that there is an issue of material fact which the Superior Court should have submitted to a jury and that, therefore, the Superior Court erred in deciding the issue as a matter of law.

Our Supreme Court recognizes the authority of a superior court judge to decide the issue of *devisavit vel non*, without submitting the issue to a jury, when there is no material issue of fact raised:

Where, as here, propounder fails to come forward with evidence from which a jury might find that there has been



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a testamentary disposition it is proper for the trial court under Rule 50 of the Rules of Civil Procedure to enter a directed verdict in favor of the caveators and adjudge, as a matter of law, that there can be no probate.

*In re Will of Mucci*, 287 N.C. 26, 36, 213 S.E.2d 207, 214 (1975).<sup>2</sup> Accordingly, we conclude that a judge of the Superior Court may determine that a document is not a decedent's will *as a matter of law* in the appropriate case.

In this case before us today, the Superior Court decided, as a matter of law, that the Holographic Document was not Mr. Worley's will, reasoning that the language Mr. Worley used fails to accomplish any testamentary purpose. Indeed, the Holographic Document merely appoints "Pat" as Mr. Worley's "power of attorney" over his property, a power which by law ceases when Mr. Worley dies. *See* N.C. Gen. Stat. § 32C-1-110(a)(1) (2017) (stating that "[a]power of attorney terminates when . . . [t]he principal dies.").

The Siblings contend that the Superior Court got it right (in which case they would stand to inherit as Mr. Worley's heirs at law), citing "[t]he most instructive case" on point as being *In re Seymour's Will*, 184 N.C. 418, 114 S.E. 626 (1922). *Seymour's Will* involved a document whereby the decedent appointed her husband as her power of attorney and contained language indicating that the decedent intended the document to be her last will and testament. *Id.* at 418, 114 S.E. at 626. We agree with the Siblings that *Seymour's Will* is highly instructive; however, we do not agree that *Seymour's Will* necessarily requires the result reached by the Superior Court.

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2. *See In re Will of Jones*, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576 (2008) (suggesting that summary judgment on the issue of *devisavit vel non* is proper where there is no issue of material fact on the issue). *See also In re Will of McNeil*, 230 N.C. App. 241, 243, 749 S.E.2d 499, 501-02 (2013) (recognizing the propriety of summary judgment on the issue of *devisavit vel non*).

Some older cases from our Supreme Court held that the issue of *devisavit vel non* *had to be* decided by a jury and could *never be* decided by the judge as a matter of law. *See In re Ellis' Will*, 235 N.C. 27, 32, 69 S.E.2d 25, 28 (1952) (caveat proceeding "must proceed to judgment, and a motion for judgment as of nonsuit, or for a directed verdict, will not be allowed."). However, it was held in other older cases that a judge could determine the validity of a document as being a will, as a matter of law. *See In re Johnson's Will*, 181 N.C. 303, 306, 106 S.E. 841, 842 (1921) (holding that "[t]he refusal to submit an issue as to the [testamentary] intention of the deceased was not erroneous, as this intent must be gathered from the letter and the surrounding circumstances, and a finding of the jury contrary to the language used in the letter could not be sustained.").

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The document offered for probate in *Seymour's Will* was signed by Mrs. Seymour and, like the Holographic Document here, contains language appointing someone as a “power of attorney,” stating:

This is to certify that I, [Mrs. Seymour] do this 26 July 1921, invest my husband, [ ], with full power of attorney over [all of my property] for the purpose of acting for me in all business matters[.]

This also constitutes my last will.

*Id.* at 418, 114 S.E. at 626. The Superior Court determined as a matter of law that no part of the two-sentence document operated as a will, a determination which was affirmed by our Supreme Court. *Id.* at 421, 114 S.E. at 628.

Our Supreme Court held that the first sentence did not operate as a will. *Id.* at 420-21, 114 S.E. at 627. In reaching that conclusion, the Supreme Court was *not* so troubled by Mrs. Seymour’s use of the words “power of attorney,” recognizing that the words used by a testatrix need not be “technically appropriate” to be legally effective in creating a *testamentary* disposition of one’s property:

It is true that no particular form of words is necessary to express an intention to dispose a person’s property after his death, *and the use of inartificial language will not be permitted to defeat an apparent intention expressed in an instrument* which [otherwise] complies with the formalities of law. . . . This [intention] may be manifested by an intention [that the power granted or disposition made not] to take effect in any way until the testator’s death.

*Id.* at 420, 114 S.E. at 627 (emphasis added). Rather, our Supreme Court so held because the words used by Mrs. Seymour clearly evinced an intent that the power granted would take effect immediately, during her lifetime:

One of the essential elements of a will is a disposition of property *to take effect after the testator’s death*. . . .

[However,] a written instrument to be a will must make some positive disposition of the testator’s property [or make an appointment of an executor or guardian of the testator’s minor children], and if it fails to do this, it is not a will and testament. . . .

If under the instrument any interest vests, or if such interest fails to vest merely because of lack of delivery of the

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instrument, then it is not a will. In other words, if any interest either vests or is capable of vesting prior to the death of the maker, the instrument is not a will.

*Id.* at 419-20, 114 S.E. at 627.

Our Supreme Court further reasoned that the second sentence – “This also constitutes my last will” – likewise was not effective in creating a valid will, notwithstanding that Mrs. Seymour may have so intended. *Id.* at 420-21, 114 S.E. at 627-28. The Court reasoned that the word “This” could, at best, refer back to the first sentence, but that, a document titled a “will” of a maker, which only makes dispositions taking effect before the maker’s death, does not create a will:

The clause “This also constitutes my last will” does not operate as a disposition of the maker’s property to take effect after her death, because the word “this” refers to the instrument in controversy, which is merely a power of attorney relating to the management of her property *in her lifetime*. Probably Mrs. Seymour intended to make a will and thought she had accomplished her purpose; but a will cannot be established by merely showing an intent to make one. Nor can this conclusion in any wise be affected by evidence offered to show that the alleged testatrix said “she wanted Fred to have what she had,” and treated the instrument as her will. . . .

It is a settled principle that the construction of a will must be derived from the words in it, and not from extrinsic averment.”

*Id.* at 421, 114 S.E. at 627-28 (emphasis added) (internal quotation marks omitted).

Ultimately, our Supreme Court concluded that there was no need to submit to a jury whether Mrs. Seymour *intended* the document as a will: even if a jury so determined, such determination would be meaningless to the case, as the language used was unambiguous in granting the power to her husband during her lifetime. *See id.* at 421, 114 S.E. at 627-28 (noting that “[p]robably Mrs. Seymour intended to make a will and thought she had accomplished her purpose; but a will cannot be established by merely showing an intent to make one.”).

In the present case, we conclude that a jury *could* reasonably infer from the language that Mr. Worley intended the document to be his will. For instance, the Holographic Document is titled “Last Will of Paul

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Worley.” We further conclude that, unlike in *Seymour’s Will*, it would not be a waste of time to submit the issue to a jury, as the language in the Holographic Document is sufficiently ambiguous to allow a construction to effectuate a testamentary transfer of property.

If the jury determines that Mr. Worley drafted the document with *animo testandi*, that is, with testamentary intent, *see In re Will of Mucci*, 287 N.C. at 30, 213 S.E.2d at 210, then it could reasonably be construed *from the language used in the Holographic Document* and perhaps from other competent evidence presented that Mr. Worley intended to grant “Pat” with some power over his property to take effect only after he died. *See Institute v. Norwood*, 45 N.C. 65, 69 (1852) (internal quotation marks omitted) (explaining that a court, “under the maxim *ut res majis valeat quam pereat* will try to give” meaning to every clause in a will). For instance, the language could be construed an expression of intent to grant Pat with a power of appointment over his property at his death, pursuant to Chapter 31D of our General Statutes. *See* N.C. Gen. Stat. § 31D-2-201 cmt. (2017) (recognizing the appropriateness of conferring a power of appointment over one’s property in a will). Indeed, one could reasonably construe from the language employed by Mr. Worley, presumably a non-lawyer, that he wanted Pat to have absolute discretion to dispose of his estate in any way she saw fit, so long as she did not give any of his estate to “Grace Price Worley.”<sup>3</sup> Alternatively, it might be reasonable to construe the language as an expression of intent to grant Pat with the power of an executrix over his estate. Or, it could be determined that the language could be subject to reformation pursuant to N.C. Gen. Stat. § 31-61 (2017) to change to language altogether to conform the language to Mr. Worley’s true intent.<sup>4</sup> (We do not express any opinion regarding any of these or other possible interpretations. We simply express that there are ways to construe the Holographic Document to give it testamentary meaning and effect, should a jury determine the Document to be a will.)

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3. Of course, it could be reasonably construed that Mr. Worley did not intend to limit Pat’s authority in the sentence regarding Grace, but that he was merely expressing a non-binding desire to Pat that Pat not give any of the estate to Grace.

4. It has long been the law of this State that a “patent” ambiguity could not be explained by evidence outside the language of the will, and if there is no way to give language that is “patently” ambiguous any meaning, then the language must be ignored. *See Institute*, 45 N.C. at 68 (explaining the difference between patent and latent ambiguities). However, with the adoption of N.C. Gen. Stat. § 31-61 by our General Assembly, courts may consider any clear and convincing evidence to decipher language that is even patently ambiguous, so long as the language is determined to be ambiguous in the first instance. That is, Section 31-61 does not empower a court to reform unambiguous provisions in a will.

**KLEOUDIS v. KLEOUDIS**

[271 N.C. App. 35 (2020)]

**III. Conclusion**

We, therefore, reverse the Superior Court's order directing that probate be revoked, and we remand the matter for further proceedings. There is an issue of fact as to whether Mr. Worley intended the Holographic Document to be his will and, otherwise, whether the Document meets the other statutory requirements of a holographic will. The issues of *devisavit vel non* are for a jury to decide, not the Superior Court as a matter of law at this point.

Should it be determined that the Holographic Document is not Mr. Worley's valid will, then the Superior Court shall direct the Clerk to revoke probate. However, should it be determined that the Holographic Document does meet the statutory requirements of a holographic will (assuming those requirements are put at issue) and that the document was executed with testamentary intent and is otherwise valid, this estate proceeding shall continue, including the resolution as to the construction that is to be given to the language contained in the Holographic Document.

REVERSED AND REMANDED.

Judges STROUD and BERGER concur.

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CHRISTI SEAL KLEOUDIS, PLAINTIFF  
v.  
DEMETRIOS BASIL KLEOUDIS, DEFENDANT

No. COA19-145

Filed 21 April 2020

**1. Child Custody and Support—support order—section 50-13.4(c)—findings**

In a non-guideline child support matter, the trial court did not abuse its discretion where it made sufficient findings pursuant to N.C.G.S. § 50-13.4(c) (which the father did not challenge as being unsupported by evidence) indicating it gave “due regard” to the parties’ (approximately equal) estates, earnings, conditions, and accustomed standard of living, despite not using some of the statutory language. The court was not required to make detailed findings about each individual asset and liability of the parties, and the court’s findings were supported by evidence in the form of testimony and the parties’ financial affidavits.

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[271 N.C. App. 35 (2020)]

**2. Child Custody and Support—support order—expenses for child—trial court’s determination**

In a non-guideline child support matter, the trial court did not abuse its discretion in arriving at its total of the child’s expenses where it explained its methodology, its findings were supported by evidence, and it took into account expenses attributed to the child on the father’s financial affidavit. Some of the father’s arguments would have actually led to a higher child support obligation than what was calculated.

**3. Child Custody and Support—support order—father’s expenses—determination based on affidavit**

In a non-guideline child support matter, the trial court did not abuse its discretion in arriving at its total of the father’s expenses, despite the father’s argument that a portion of his household expenses should have been attributed to the child, because the trial court’s determination on the father’s ability to pay was based on all the expenses listed in the father’s financial affidavit, and any reduction in the father’s expenses could actually increase the amount he would be required to pay.

**4. Child Custody and Support—support order—custodial schedule—findings**

The trial court’s findings in a child support order regarding the child’s custodial schedule gave appropriate consideration to the amount of custodial time granted to the father in the permanent custody order.

**5. Child Custody and Support—support order—arrear—miscalculation—de minimis**

In a non-guideline child support matter, the trial court’s miscalculation of one month’s child support arrears owed by the father did not merit reversal where the de minimis error amounted to less than two percent of the father’s total arrears.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendant from order entered 21 September 2018 by Judge Michael J. Denning in District Court, Wake County. Heard in the Court of Appeals 20 August 2019.

*Jackson Family Law, by Jill Schnabel Jackson, for plaintiff-appellee.*

**KLEOUDIS v. KLEOUDIS**

[271 N.C. App. 35 (2020)]

*Nicholls & Crampton, PA, by Nicholas J. Dombalis, II, for defendant-appellant.*

STROUD, Judge.

Defendant-father appeals the trial court's permanent child support order. Because the trial court made sufficient findings of fact to support its determination of defendant-father's child support obligation, we affirm.

### I. Background

On 7 July 2016, plaintiff-mother filed a verified amended complaint against defendant-father for equitable distribution, permanent child support, and absolute divorce. The parties have two children, one of whom reached the age of majority before the custody claim was filed, and a son, Neal, who was born in 2004.<sup>1</sup> On 8 August 2016, Father filed an amended answer to the amended complaint and counterclaimed for custody and equitable distribution. On 16 September 2016, a judgment of divorce was entered, and, on 24 October 2016, the trial court entered an interim distribution order. On 25 October 2016, the trial court entered a temporary child custody order granting the parties joint legal custody. The temporary custody order provided that Neal would reside primarily with Mother during the school year and set out a detailed schedule for physical custody for weekends, summers, and holidays. On 9 November 2017, the trial court entered an Order Appointing Parenting Coordinator based upon its finding that this “action is a high-conflict case” and the appointment of a parenting coordinator would be in the child's best interest. The order specifically authorized the parenting coordinator to “adjust Defendant's visitation (both the regular schedule and the holiday/special time schedule) to accommodate Defendant's flight schedule,”<sup>2</sup> which would be set out in more detail in the permanent custody order.

On 23 October 2017, the trial court heard the parties' claims for permanent child custody and child support. On 19 January 2018, the trial court entered a Memorandum of Judgment/Order setting out “custodial provisions to be followed by the parties until such time as entry of a permanent custody order” and noting that the terms were “rendered to the parties at the close of the evidence at their trial on permanent custody.” This custodial schedule gave Mother primary physical custody and Father eight overnights per calendar month, to be exercised

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1. We have used a pseudonym to protect the identity of the minor child.

2. Father is a commercial airline pilot.

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based upon Father's availability due to his work schedule. Father was required to provide a copy of his work schedule and overnight visitation dates each month to Mother and the parenting coordinator. On 29 May 2018, the trial court entered the permanent custody order, which set out essentially the same custodial schedule as in the Memorandum. On 21 September 2018, a permanent child support order was entered. Defendant appeals only the child support order.

**II. Standard of Review**

The trial court found the parties' combined monthly adjusted gross income was more than \$25,000 so the trial court did not use the Child Support Guidelines to calculate Father's child support obligation. Where the parties' incomes are above the Guidelines, the trial court must set child support "in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case." N.C. Gen. Stat. § 50-13.4 (2017).

"Child support orders entered by a trial court are accorded substantial deference by appellate courts and our review is limited to a determination of whether there was a clear abuse of discretion." *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). Where the child support guidelines do not apply, the trial court must determine "child support on a case-by-case basis" and "the order must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount." *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 610, 596 S.E.2d 285, 291 (2004) (citations and quotation marks omitted).

In determining the relative ability of the parties to pay child support, the trial court must hear evidence and make findings of fact on the parents' incomes, estates and present reasonable expenses. Although the trial court is granted considerable discretion in its consideration of the factors contained in N.C. Gen. Stat. § 50-13.4(c), the trial court's finding in this regard must be supported by competent evidence in the record and be specific enough to enable this Court to make a determination that the trial court took due regard of the particular estates, earnings, conditions, and accustomed standard of living" of both the child and the parents.

*Id.* (citations, quotation marks, ellipses, and brackets omitted).



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**III. Findings of Fact on Estates, Conditions, and Accustomed Standard of Living**

**[1]** Father first challenges several findings of fact and conclusions of law particularly “as to the estates, conditions, [and] accustomed standard of living of the child and the parties[,]” (original in all caps), but rather than challenging these findings of fact as unsupported by the evidence, he argues the trial court should have made different findings based upon the evidence or failed to make additional necessary findings of fact. However, “[u]nchallenged findings of fact are binding on appeal.” See *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011). The binding findings first note that the parties entered into a Separation Agreement and Property Settlement, which is part of the record, resolving all claims of child support up to 30 November 2016. As to specific findings of income and expenses, the trial court found:

10. Plaintiff is employed full-time as a statistician with Parexel. Plaintiff’s current gross income from employment is \$15,781 per month. After mandatory deductions (federal & state taxes, Social Security, Medicare) of \$5,818 per month and voluntary deductions (health, dental & vision insurance, life insurance, disability insurance, medical spending account, and retirement) of \$2,018 per month, Plaintiff’s net after-tax income from employment is \$8,035 per month.

11. In prior years, Plaintiff has received a bonus from Parexel that was tied to company performance, but Plaintiff received notification prior to the date of trial that no bonus will be paid in 2017.

12. Plaintiff received a substantial bonus in 2016 that resulted from work she had performed at GlaxoSmithKline some years prior to the date of separation. This bonus of \$156,000 was divided equally between the parties in their equitable distribution settlement and is not considered by the Court as part of Plaintiff’s income for purposes of calculating prospective child support.

13. Defendant is employed full-time as a commercial airline pilot with American Airlines. Defendant’s current gross income from employment is \$28,917 per month. After mandatory deductions (federal & state taxes, Social Security, Medicare, APA union dues) of \$10,973 per month and voluntary deductions (health & dental insurance, life

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insurance, retirement) of \$2,215 per month, Defendant's net after-tax income from employment is \$15,729 per month.

14. Both parties report approximately the same amount of investment income, interest, and dividends resulting from marital investments that were divided equally between the parties as part of their property settlement. Neither party actually takes distributions or withdrawals from these investments, however, and the Court does not find that either party is required to deplete his/her assets to pay child support for the benefit of the minor child as set forth below.

15. The parties' combined gross income exceeds \$300,000 per year, so that the parties are "off the Guidelines" for purposes of calculating their respective support obligations for the benefit of the minor child.

16. Plaintiff incurs reasonable and necessary monthly expenses for herself in the amount of \$4,107 per month, calculated as follows:

a. \$2,885, or 50% of the Household Expenses from Plaintiff's September 2017 Financial Affidavit (excluding 100% of "Furniture & Household Furnishings" and 100% of "Legal Fees / Divorce Expenses"); plus

b. \$1,222, or 100% of the "Part 2: Individual Expenses" for self from Plaintiff's September 2017 Financial Affidavit.

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19. Defendant earns 65% and Plaintiff earns 35% of the parties' total gross income of \$44,698 per month. It is reasonable and appropriate for each party to pay a pro rata share of the child's reasonable and necessary monthly expenses in accordance with his/her pro rata share of their comparative gross income.

20. Defendant's net ability to pay child support for the benefit of the child is \$5,916 per month (i.e., \$15,729 net income- \$9,813 expenses). Defendant has the ability to pay his 65% share of the child's reasonable and necessary monthly expenses of \$2,517 per month (i.e., \$3,873 x 65%).

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21. Plaintiff's net ability to pay child support for the benefit of the child is \$3,928 per month (i.e., \$8,035 net income - \$4,107 for "self" expenses). Plaintiff has the ability to pay her 35% share. of the child's reasonable and necessary monthly, expenses of \$1,356 per month (i.e., \$3,873 x35%).

We will first address Father's argument as to the trial court's findings regarding the parties' estates.

A. Estates

Father first contends the trial court failed to make sufficient findings of fact regarding the parties' "estates:"

[t]here are no findings made by the Trial Court concerning the value of the parties' assets, including any separate assets that they may own that would not have been included in the marital assets that were distributed between them. No findings were made regarding the value of each parties' investment accounts, bank accounts, real estate retirement accounts or other assets owned by them, all of which would bear on the relative ability of the parties to pay support and the accustomed standard of living of the minor child and the parties.

It is not enough that there may be evidence in the record sufficient to support findings which could have been made.

Thus, Father acknowledges that substantial evidence was presented regarding the estates of the parties but contends the findings of fact were not sufficient because the trial court did not make detailed findings as to the values of various assets and accounts.

North Carolina General Statute § 50-13.4(c) sets the standard for child support in cases not covered by the North Carolina Child Support Guidelines:

Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c) (2017).

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The trial court noted its consideration of the estates of the parties and found that neither party would have to deplete his or her estate to support the child. Giving “due regard” to the estates of the parties does not require detailed findings as to the value of each individual asset but requires only that the trial court consider the evidence and make sufficient findings addressing its determination regarding the estates to allow appellate review. The trial court made several findings of fact regarding the parties’ estates, and Father does *not* challenge those findings as unsupported by the evidence.

11. In prior years, Plaintiff has received a bonus from Parexel that was tied to company performance, but Plaintiff received notification prior to the date of trial that no bonus will be paid in 2017.

12. Plaintiff received a substantial bonus in 2016 that resulted from work she had performed at GlaxoSmithKline some years prior to the date of separation. This bonus of \$156,000 was divided equally between the parties in their equitable distribution settlement and is not considered by the Court as part of Plaintiff’s income for purposes of calculating prospective child support.

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14. Both parties report approximately the same amount of investment income, interest, and dividends resulting from marital investments that were divided equally between the parties as part of their property settlement. Neither party actually takes distributions or withdrawals from these investments, however, and the Court does not find that either party is required to deplete his/her assets to pay child support for the benefit of the minor child as set forth below.

Before the trial court, Father’s argument regarding the parties’ estates acknowledged that the parties’ estates were approximately equal. Father argued that because of how their property was divided in equitable distribution, Mother received “liquid assets” and he got “non-liquid assets.”<sup>3</sup> Because Mother got “liquid assets[,]” Father argued “she

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3. In setting child support, the trial court factored in only Father’s income from employment; Father reported income of \$2,460.67 monthly as investment income, in addition to his wages from American Airlines, but the trial court used only his wages to determine his ability to pay support.

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can use that money to help pay for [the child's] expenses." Father contends the trial court was required to make detailed findings of the values of each of the parties' investments and assets, although he does not explain what difference these findings would make in the child support calculation. But the law does not require these findings. *See generally Kelly v. Kelly*, 228 N.C. App. 600, 607–08, 747 S.E.2d 268, 276 (2013). North Carolina General Statute § 50-13.4(c) requires the trial court to have "due regard" to the factors listed; it does not require detailed evidentiary findings on the parties' assets and liabilities. *See id.*

Father's argument overlooks the importance of the ultimate findings of fact the trial court made. The trial court need not make specific findings of each subsidiary fact supporting its ultimate finding.

There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.

. . . .

Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.

In summary, while Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require specific findings of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

. . . .

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The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

*Quick v. Quick*, 305 N.C. 446, 451–52, 290 S.E.2d 653, 657–58 (1982) (citations, quotation marks, and ellipses omitted).

Defendant faults the trial court's order for its brevity, stating:

In the present case, the Court has entered a bare bones three (3) page order, with insufficient evidence to support the findings of fact and conclusions of law, to support its denial of Mr. Kelly's Motion to Modify Alimony. The Court, after hearing three days of testimony involving valuable assets, the finances of a law firm, staggering debt and reviewing extensive financial records made a mere eighteen findings of fact, only twelve of which related to the evidence offered at trial.

But brevity is not necessarily a bad thing; Cicero said that Brevity is the best recommendation of speech, not only in that of a senator, but too in that of an orator, or, we might add, in many instances, a judge. The trial court found the ultimate facts which were raised by the defendant's motion to modify, and where the evidence supports these findings, that is sufficient. The court is not required to find all facts supported by the evidence, but only sufficient material facts to support the judgment.

*Id.* at 607–08, 747 S.E.2d at 276 (citations, quotation marks, and brackets omitted).

As in *Kelly*, the trial court's brevity is not a bad thing. *See id.* at 608, 747 S.E.2d at 276. The trial court made two findings of fact which adequately address the estates of the parties: First, the trial court in

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finding 12 addressed the bonus of \$156,000 received by Mother, which was divided equally between the parties; the trial court did not abuse its discretion in determining that it would not consider this portion of the estates of the parties in its child support determination. *See generally Hinshaw v. Kuntz*, 234 N.C. App. 502, 505, 760 S.E.2d 296, 299 (2014) (noting that our standard of review in child support cases is abuse of discretion). As to the other evidence regarding the parties' estates, the trial court made Finding of Fact 14, noting that both parties' estates were approximately the same, neither party was taking distributions from their investments, and neither would be required to deplete his or her assets to support the child.

Father also relies on *Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014), in making his first argument, but this reliance is misplaced. In *Loosvelt*, the trial court made *no* finding of fact as to the father's income or estate:

There is no finding of fact as to plaintiff's actual income, only that it is "substantial." We can infer that "substantial" here means more than \$24,409.66 but we cannot, determine what the trial court found plaintiff's income to be. Furthermore, the trial court found that although plaintiff claims to earn \$24,409.66 on average per month, he actually spends an average of \$88,617.80 per month. Here, the trial court clearly assumed that the plaintiff's income is quite significantly more than \$25,000 per month, but we have no way of knowing what number the trial court had in mind.

*Id.* at 103, 760 S.E.2d at 360 (brackets and footnote omitted). The trial court in *Loosvelt* also failed to make findings as to the father's estate, other than in the context of his expenses:

In addition, even though the trial court's order contained some findings as to the estates, N.C. Gen. Stat. § 50-13.4(c), of the parties, particularly plaintiff, it did not make any findings which would permit consideration of plaintiff's estate as supporting his ability to pay child support; rather, the findings of fact addressed only the expenses plaintiff has incurred. For example, the trial court found that "Plaintiff/Father owns and pays for two (2) luxury residences in Los Angeles, California at a cost of approximately \$12,000.00 per month." Having a large house payment does not necessarily equate to having a substantial estate; it can mean just the opposite. The trial

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court did not find the value of these “luxury residences,” whether plaintiff’s indebtedness on these residences equals or exceeds their values, or any other facts regarding the net value of plaintiff’s estate.

*Id.* at 104, 760 S.E.2d at 361 (brackets omitted). The circumstances of this case bear no relevant resemblance to *Loosvelt* as the trial court made detailed findings regarding the parties’ incomes and expenses and made an ultimate finding of fact regarding its consideration of the estates of the parties. *Contrast id.*, 235 N.C. App. 88, 760 S.E.2d 351.

In summary, the trial court properly considered the evidence and made sufficient findings of fact showing “due regard” to the estates of the parties. Further, the trial court did not abuse its discretion by determining that it would not base the child support calculation on the estates of the parties because they were essentially equal and neither party would be required to deplete his or her accounts and properties to support the child. *See generally Hinshaw*, 234 N.C. App. at 505, 760 S.E.2d at 299 (“In reviewing child support orders, our review is limited to a determination whether the trial court abused its discretion. Under this standard of review, the trial court’s ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” (citation and quotation marks omitted)).

**B. Conditions and Accustomed Standard of Living**

Father also argues “[t]he trial court failed to make any findings or conclusions regarding the accustomed standard of living of the minor child or the parties” and compares his case to *Zurosky v. Shaffer*, 236 N.C. App. 219, 763 S.E.2d 755 (2014). *Zurosky* involved an appeal from an extensive order addressing an extraordinarily complex case with claims of equitable distribution, alimony, and child support. *See id.* Father argues, “[u]nlike the extensive findings of fact made by the Trial Court in *Zurosky v. Shaffer*, *supra*, the Trial Court in this matter made no findings regarding the child’s ‘health, activities, educational needs, travel needs, entertainment, work schedules, living arrangements, and other household expenses.’” In *Zurosky*, the “extensive findings of fact” were necessary to address the specific issues and arguments raised by the parties in that case, but there is no requirement that every non-guideline child support order include such extensive detail; all that is required is that the findings of fact address the factors noted by North Carolina General Statute § 50-13.4 to the extent evidence is offered on each factor, particularly those factors in dispute. *See generally* N.C. Gen. Stat. § 50-13.4 (2017).



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Mother notes that as to the child “[t]here was no evidence presented at trial by either party regarding the estate or earnings of the minor child, but the child’s accustomed standard of living was reflected in the expenses incurred by each party for the benefit of the child, as set out in each party’s financial affidavit.” “The affidavits were competent evidence in which the trial court was allowed to rely on in determining the cost of raising the parties’ children.” *Row v. Row*, 185 N.C. App. 450, 460, 650 S.E.2d 1, 7 (2007). Before the trial court, Father did not make an argument regarding any dispute about the child’s standard of living; there was no claim of excessive spending or of failure to provide for the child by either party. Findings 17 and 18 address the needs of the minor child based upon the financial affidavits and testimony, and the trial court noted the specific items it excluded from the expenses it determined to be reasonable. Based upon the evidence and record, the trial court’s findings demonstrate that it took “due regard” of the conditions and accustomed standard of living of the child and parents. *See Cohen v. Cohen*, 100 N.C. App. 334, 339-40, 396 S.E.2d 344, 347-48 (1990) (“In a child support matter, the trial judge must make written findings of fact that demonstrate he gave due regard to the estates, earnings and conditions of each party. G.S. § 50-13.4(c). . . . Defendant argues that the trial court’s refusal to specify the value of plaintiff’s estate was error. We disagree. A trial judge must make conclusions of law based on factual findings specific enough to show the appellate courts that the judge took due regard of the parties’ estates. The findings referred to above demonstrate the requisite specificity required of a trial judge in a matter such as this despite his understandable reluctance to place an exact dollar figure on plaintiff’s estate. Defendant’s assignment of error is overruled.” (citations, quotation marks, ellipses, and brackets omitted)).

There is no requirement the trial court’s findings use “magic words” such as “estates” or “accustomed standard of living” where the findings demonstrate that it did consider the evidence as to these factors in setting the child support obligation. *See generally id.* Father has demonstrated no abuse of discretion in the trial court’s consideration of the conditions or accustomed standard of living of the parties or child. *See generally Hinshaw*, 234 N.C. App. at 505, 760 S.E.2d at 299.

**IV. Expenses for Child**

**[2]** Father’s next argument contends the trial court erred by failing to consider expenses he incurred for the minor child during his secondary

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custodial time.<sup>4</sup> Specifically, Father argues that the trial court erred by not including as part of the child's total monthly individual expenses amounts he claimed for the child on his financial affidavit, in addition to the expenses incurred by Mother. Father argues that since the trial court set child support based upon the *pro rata* responsibility of each party for the child's expenses based upon their incomes, all of the child's individual expenses should have been included, whether incurred by him or by Mother. Specifically, he addresses findings of facts 17 and 18:

17. Plaintiff incurs reasonable and necessary monthly expenses for the benefit of the minor child of \$3,873 per month, calculated as follows:

a. \$2,885, or 50% of the Household Expenses from Plaintiff's September 2017 Financial Affidavit (excluding 100% of "Furniture & Household Furnishings" and 100% of "Legal Fees / Divorce Expenses"); plus \$988, or 100% of the "Part 2: Individual Expenses" for the minor child from Plaintiff's September 2017 Financial Affidavit.

18. Defendant incurs reasonable and necessary monthly expenses for himself in the amount of \$9,813 per month, calculated as follows:

a. \$6,578, or 100% of the Household Expenses from Defendant's September 19, 2017 Amended Financial Affidavit; plus

b. \$3,235, or 100% of the "Part 2: Individual Expenses" for self from Defendants September 19, 2017 Financial Affidavit (excluding \$3,000 of the \$3,974 listed for "Professional Fees," which the Court estimates to be primarily related to this litigation and not an ongoing expense;

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4. Father's cited cases simply do not apply here. *See generally Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977), *superseded by statute as stated in Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991). *Jones*, relying on *Goodson* does not address *establishment* of a child support obligation but instead arise in the context of contempt proceedings, where the payor has requested "credit" against court-ordered child support for expenses of the children paid during visitation time. *See Jones*, 52 N.C. App. 104, 278 S.E.2d 260. And *Jones* and *Goodson* now have limited relevance even in the context of contempt proceedings, since they "were decided before N.C.G.S. § 50–13.10 became effective on 1 October 1987. Under this statute, if the supporting party is not disabled or incapacitated as provided by subsection (a)(2), a past due, vested child support payment is subject to divestment only as provided by law, and if, but only if, a written motion is filed, and due notice is given to all parties before the payment is due. N.C.G.S. § 50–13.10(a)(1) (1987)." *Craig v. Craig*, 103 N.C. App. at 619, 406 S.E.2d at 658 (citation, quotation marks, ellipses, and brackets omitted).

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and also excluding the \$2,000 listed for “Retirement & Investment” that already was accounted for as a voluntary deduction from Defendant’s gross income).

Father has not demonstrated any abuse of discretion in the trial court’s calculations. Father’s total fixed household expenses would be the same, whether a portion is attributed to the child or not, and in determining his ability to pay child support, the trial court gave Father credit for 100% of his expenses for both of his residences as stated on his affidavit.<sup>5</sup> Furthermore, some of the “individual expenses” attributed to the child on Father’s affidavit *were* included in the trial court’s calculation. For example, Father’s affidavit included the portions of dental, vision and life insurance premiums as attributed to the child and the trial court actually included the *total* deduction for these premiums, including portions for the child, from Father’s gross income. Based upon Father’s argument his child support obligation could actually be *higher* than the trial court ordered.

Father’s trial testimony addressed the two largest individual expenses he incurred for the child. Father’s affidavit included an expense of \$505 per month for “[w]ork related child care expense[.]” But Father testified he did not actually incur work-related child care expenses. Father testified the \$505 on his affidavit was based upon “the Preston Wood Country Club, the fees, and [the child’s] camps,” and Mother had “asked [him] to do that” but he did not use any child care when the child was with him in the summer.<sup>6</sup> Under these circumstances, where Father testified he did not use work-related day care and the permanent custody order awarded Father an average of eight overnights per month of visitation, the trial court did not abuse its discretion in excluding Father’s alleged work-related child care expense from its child support calculations.<sup>7</sup> Father’s affidavit also listed an uninsured dental and

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5. In his testimony, Father corrected a few numbers on the affidavit, but those corrections are not relevant to the issues on appeal. Father corrected the amounts of Medicare taxes, life insurance premiums (which had been included in two places), and the amount of union dues. Father also testified that his household expenses were for two homes, as he had a home in Cary and a home in Wilmington.

6. Father also received the Preston Wood Country Club membership under the parties’ Separation Agreement.

7. Father’s visitation schedule was based upon his work schedule, so he would not be working when the child is with him. Father argues that his visitation time will likely increase, as the permanent custody order appointed a parenting coordinator and stated an “ultimate goal” of Defendant having 40% of the overnights each month[.]” But on appeal, this Court can consider only the circumstances existing based upon the orders currently in effect, not the possibility of a different schedule in the future.

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orthodontic expense for the child of \$650 per month, but he testified this number was based upon a periodontal surgery which cost \$7,785 in 2017, not an ongoing expense.

After omitting the expenses for the country club dues and orthodontic care, Father would be left with \$827.55 per month in individual child expenses he contends the trial court should have included in its calculation. Using these numbers and based upon Father's argument on appeal, the child's total monthly individual expenses would have been \$4700.55, and father's 65% share of these expenses would be \$3,055.00 – resulting in a *higher* child support obligation than the trial court ordered. Had the trial court also included Father's income from investments, his share of the total income would have been higher also and thus the monthly child support obligation would be even higher.

Father makes additional arguments, all without citation of authority and without challenging any findings as unsupported by the evidence, regarding the particular expenses included in the calculation of the child's expenses. But Father's arguments demonstrate no abuse of discretion by the trial court. The trial court could have calculated child support differently, resulting in either a higher or lower amount, but there is no abuse of discretion.<sup>8</sup> The trial court's findings clearly demonstrate how the child support was calculated and the findings are supported by the evidence.

**V. Finding of Father's Expenses**

**[3]** Father also argues the trial court erred by finding his reasonable and necessary monthly expenses as \$9,813.00 per month. Father does not challenge the finding as unsupported by the evidence but again argues that the trial court should have attributed a portion of his household expenses to the child, based upon the expenses he incurs when the child his with him. Father contends that the trial court should be required “to determine a reasonable percentage” of his “Part One Household Expenses that are attributable to the minor child” based upon the

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8. Before the trial court, Father's main argument regarding child support was that he should not have to pay *any*. Father testified, “I don't think I should pay anything in child support to Christi.” Father made no argument regarding how the trial court should calculate child support; his counsel argued only that Mother is “able to support [the child] by herself[,]” and Father is “capable of supporting [the child] by – when he's with him and continue to pay the Preston Wood Country Club Membership, can continue to provide – or provide life insurance for [the child]. If your Honor is going to order some amount of child support, then we would ask you to consider the fact that she's got – she's got money with which to help defray those costs[,]” referring to assets Mother received under the Property Settlement Agreement.

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amount of time he spends with Father. Father claims “[t]his would result in a reduction in the amount of Household Expenses that the Trial Court has found are [his] expenses, and a finding that the minor child’s reasonable needs include a portion of those Household Expenses which [he] incurs for the minor child.” Father’s argument ignores that the trial court found his ability to pay child support based upon all of his expenses based upon his affidavit. A reduction of his individual expenses would increase his ability to pay; it would also increase the child’s individual expenses. It is entirely unclear that such a change would decrease his child support obligation; it may even increase it. In any event, he has shown no abuse of discretion in the trial court’s findings of his expenses or allocation of those expenses to him.

**VI. Finding as to “Worksheet A” Primary Custodial Schedule**

**[4]** Father also argues the trial court’s findings that the child would reside primarily with Mother on a “Worksheet A” schedule “are inconsistent with the evidence presented to the Trial Court” and the amounts of time awarded in the Temporary Child Custody Order, Memorandum of Order, and Permanent Child Custody Order. Father’s argument challenges findings of fact 8 and 9:

8. The child has resided primarily with Plaintiff on a “Worksheet A” schedule since November 30, 2016.

9. A Permanent Child Custody Order (“Custody Order”) has been entered. Pursuant to that Custody Order, Plaintiff will continue to exercise “Worksheet A” primary custody of the minor child.

To be clear, Father does not contend the trial court used Worksheet A of the child support guidelines to calculate child support. There is no dispute the parties’ combined incomes fall above the child support guidelines. The trial court used the term “Worksheet A” simply as a shorthand way to describe the custodial schedule.<sup>9</sup> Nor does Father challenge these findings are unsupported by the evidence. Father argues instead that the trial court failed “to give ‘due regard’ to the significant custodial time” he was awarded in the custody order.

The Permanent Custody Order provides the child “shall reside primarily with Plaintiff. The minor child shall be with Defendant for eight (8) overnights per calendar month[.]” The custody order addresses details

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9. Under Worksheet A, the parent with secondary custody or visitation has the child fewer than 123 overnights per year. Eight overnights per month equals 96 overnights per year.

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of the schedule. Since Father is an airline pilot with a complex work schedule and the conflict between the parties required appointment of a Parenting Coordinator, the order provides for the Parenting Coordinator to assist the parties in the details of the visitation schedule.<sup>10</sup> Father is correct that the order states an “ultimate goal” of more visitation time, but the child support order is properly based upon the actual custodial schedule stated in the permanent custody order. Father’s argument is without merit.

**VII. Child Support Arrears**

[5] Last, Father argues the trial court erred by basing his child support arrears based upon the same calculations as it did for determining his prospective child support obligation.<sup>11</sup> Father was ordered to pay \$52,659 in arrearages from 1 December 2016, to 30 September 2018. Father contends the trial court erred by failing to consider the parties’ 2016 incomes in determining the child support arrearage, since the arrearages encompassed a portion of 2016.

Based upon Husband’s argument, the only potential basis for any difference in the monthly child support calculation over this period is the parties’ respective incomes. “Child support obligations are ordinarily determined by a party’s actual income at the time the order is made or modified.” *Sharpe v. Nobles*, 127 N.C. App. 705, 708, 493 S.E.2d 288, 290 (1997). Mother concedes that

Even if Defendant’s argument is correct – that the trial court should have calculated his arrears for 2016 based upon the parties’ 2016 income – then only one month of arrears was calculated incorrectly by the trial court (i.e., for the month of December 2016), resulting in an overpayment by Defendant of \$736 for that month. The remaining arrears, however, accrued during calendar year 2017 and continuing after the date of trial through the date of entry of the Permanent Child Support Order, so that the trial court properly calculated child support between the

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10. As evidenced by the appointment of a Parenting Coordinator, this case has been a “high conflict” case as defined by North Carolina General Statute § 50-90. The permanent custody order includes many findings regarding Father’s intense and openly expressed “anger about the separation to the minor child” and conflicts with both Mother and the child.

11. Father also contests the ultimate amount he was ordered to pay as prospective child support, but this argument is based on the issues already addressed.

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parties for that period using their respective gross incomes for calendar year 2017.

The rest of the child support arrears accrued after 2016, and Mother's income as of the date of trial as found by the trial court is supported by the evidence.<sup>12</sup>

A miscalculation of \$736.00 for the month of December 2016 does not require reversal and remand to the trial court. \$736.00 is less than 2% of the total arrears of \$52,659.00. The parties would likely each incur more than \$736.00 in attorney fees in a remand for the trial court to make this small change to the arrears ordered; this *de minimis* error does not warrant reversal. *See generally Cohoon v. Cooper*, 186 N.C. 26, 28, 118 S.E. 834, 835 (1923) ("Even if the difference of 95 cents (as to award of \$663.96) if award if had been against the defendant, the time of the court, both below and here, costs too much to the public to debate that matter, *De minimis non curat lex.*"); *see also Comstock v. Comstock*, 240 N.C. App. 304, 313, 771 S.E.2d 602, 609 (2015) ("The \$1,675.05 value is 0.6% of the adjusted value of the marital estate, which constitutes a *de minimis* error. As such, the trial court's erroneous calculation does not warrant reversal.").

### VIII. Conclusion

The trial court's findings of fact and conclusions of law demonstrate "due regard" to the factors required by North Carolina General Statute § 50-13.4(c), and the trial court did not abuse its discretion in the calculation of the child support obligation. We therefore affirm the order.

**AFFIRMED.**

Chief Judge McGEE concurs.

Judge MURPHY concurs in part and dissents in part.

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12. The trial was in October 2017, although the child support order was entered on 21 September 2018. The evidence in the record and upon which the trial court based the child support order was for 2016 and 2017. Father does not argue he was prejudiced by any delay in entry of the order.

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MURPHY, Judge, concurring in part and dissenting in part.

In cases where the parents earn more than \$25,000.00 per month, the trial court must determine what amount of support is necessary to meet the reasonable needs of the child based on the individual facts of the case. The trial court must give due regard to the estates, earnings, conditions, and accustomed standard of living of the parties and the child in order to reach such a determination. Where the trial court fails to consider even one of those factors in entering a child support order, the order amounts to an abuse of discretion and must be vacated. Here, the trial court failed to consider the respective estates of the parties in reaching its conclusion as to the amount of child support necessary to meet the needs of the minor child, and the child support order must be vacated in part and remanded. The remainder of the trial court's order in this matter should be affirmed. I respectfully dissent in part.

**BACKGROUND**

Defendant-Appellant Demetrios Kleoudis ("Father") challenges the trial court's *Permanent Child Support Order* entered 21 September 2018 ("the Support Order"). The Plaintiff-Appellee in this matter, Christi Kleoudis ("Mother"), and Father were married in 1986 and two children were born of the nearly thirty-year marriage. The parties separated on 6 July 2015 and subsequently entered into a Separation Agreement and Property Settlement on 30 November 2016.

On 29 May 2018, the trial court entered a *Permanent Child Custody Order* as to Father and Mother's one minor child, Wilfred.<sup>1</sup> This Custody Order provides Father with eight overnight visits per month and fourteen overnights during the Summer, and stipulates that Wilfred's Thanksgiving, Christmas, and Spring Break holidays shall be equally divided between the parties. The trial court stated its ultimate goal was for Father to have 40% of the overnights with Wilfred, as was recommended by the Parenting Coordinator. On 21 September 2018, the trial court entered the Support Order, ordering Father to pay \$2,517.00 per month in child support beginning the following month and \$52,659.00 in child support arrearage for December 2016 through September 2018. Father timely appeals the Support Order on numerous grounds.

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1. We use a pseudonym throughout this opinion to protect the juvenile's identity and for ease of reading.



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**ANALYSIS****A. Standard of Review**

“Child support orders entered by a trial court are accorded substantial deference by appellate courts and [appellate] review is limited to a determination of whether there was a clear abuse of discretion.” *Leary v. Leary*, 152 N.C. App. 438, 441, 567 S.E.2d 834, 837 (2002). The trial court must “make sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.” *Spicer v. Spicer*, 168 N.C. App. 283, 287, 607 S.E.2d 678, 682 (2005). We will only overturn the trial court’s ruling and remand for a new child support order where the challenging party can show that the ruling “was so arbitrary that it could not have been the result of a reasoned decision.” *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

**B. Father’s Child Support Obligation**

Father’s first argument on appeal is that the Support Order must be vacated and remanded because “the Trial Court failed to make appropriate findings and conclusions as to the accustomed standard of living of the parties and the minor child, the reasonable needs of the minor child, or the estates of the parties[.]” In contrast, Mother offers:

The trial court may not have used the specific terms “estates” or “accustomed standard of living” in its Permanent Child Support Order but there can be no genuine dispute that the trial court properly considered the accustomed standard of living of the child and each party in making the detailed calculations set out in Findings of Fact 16 through 23.

The record demonstrates that the trial court failed to consider the parties’ estates, and therefore abused its discretion in reaching its conclusion regarding the reasonable needs of the child.

Our child support statute provides that:

Payments ordered for the support of a minor child shall be in such amount as to meet the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, . . . and other facts of the particular case.

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N.C.G.S. § 50-13.4(c) (2019). Where, as here, the parents combined income is greater than \$25,000.00 per month, the Child Support Guidelines are inapplicable and the trial court must instead make a case-specific determination giving “due regard” to the reasonable needs of the child and the parents’ respective ability to pay. *Meehan v. Lawrance*, 166 N.C. App. 369, 383-84, 602 S.E.2d 21, 30 (2004) (describing the inapplicability of the Child Support Guidelines in “High Combined Income” cases).

As both parties correctly note in their briefs, the trial court did not use the specific terms “estates” or “accustomed standard of living” in reaching its conclusions regarding child support. Our caselaw does not allow us to conclude that the trial court’s consideration of the parties’ estates may be implied from its ultimate decision in this case; likewise, we cannot conclude the trial court complied with its statutory mandate to do so.

The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system.

*Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (internal quotation marks and citation omitted). It is well-established that the trial court’s conclusions regarding the reasonable needs of the child and the parties’ relative ability to pay

must themselves be based upon factual *findings* specific enough to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, and accustomed standard of living of both the child and the parents. It is a question of fairness and justice to all concerned. In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence. It is not enough that there may be evidence in the record sufficient to support findings which *could have been made*.

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*Id.* (emphasis added) (internal quotation marks, alterations, and citations omitted).

Although the reference appears in the section discussing “Conditions and Accustomed Standard of Living,” the majority’s opinion cites *Cohen v. Cohen*, 100 N.C. App. 334, 396 S.E.2d 344 (1990), to advance the recurring argument that the trial court’s findings took “due regard” of the statutorily required factors. In *Cohen*, we addressed trial court findings regarding a party’s total estate that, while lacking numerical specificity, still demonstrated the trial court took due regard of the statutory factors and satisfied the statutory requirements. *Cohen*, 100 N.C. App. at 339-40, 396 S.E.2d at 347-48.

However, the trial court in *Cohen* made significant detailed findings that are lacking in this case. In *Cohen*, while the trial court was “understandabl[y] reluctan[t] to place an exact dollar figure on [mother’s] *estate*,” the trial court made specific findings concerning the dollar amounts of mother’s current debts and the stock father transferred to mother “during the course of the trial.” *Id.* at 340, 396 S.E.2d at 347-48 (emphasis added). Additionally, the trial court acknowledged “equitable distribution had not yet been made,” and the stock liquidation necessary to determine the exact dollar amount of the estate rendered “any effort to determine the true net worth of [mother’s] assets . . . speculative and inappropriate.” *Id.* at 340, 396 S.E.2d at 347.

Unlike the trial court’s specific dollar amount findings concerning important and current parts of the mother’s estate in *Cohen*, the trial court in this case did not find an exact dollar amount concerning debts or marital investment income, interest, or dividends. Instead, the trial court *approximated* the “investment income, interest, and dividends resulting from marital investments” and made no findings regarding the parties’ other assets or lack thereof. None of the trial court’s factual findings quoted by the Majority constitute sufficiently specific factual findings showing due regard to the parties’ estates. Findings 10, 13, 15, and 19 relate to the parties’ income. Finding 11 references bonuses Mother received in prior years, without a specific consideration or dollar amount. Finding 12 notes a specific dollar amount of a bonus that Mother received in 2016; since the parties divided the 2016 bonus equally, the trial court did not consider the bonus as “[Mother’s] income for purposes of calculating prospective child support.” However, these funds are certainly a portion of their “estates.” Finding 14 approximates that the parties had “the same amount of investment income, interest, and dividends resulting from marital investments that were divided equally.” Finding 14 is the closest reference to the parties’

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estates, but the trial court provided no dollar amount based on the evidence. Finding 16 addresses Mother's expenses. Findings 20-21 reference the parties' "net ability to pay child support for the benefit of the child." None of these findings are specific enough concerning the parties' estates to satisfy the statutory requirement.

As we reiterated in *Cohen*, "[a] trial judge must make conclusions of law based on factual findings *specific enough* to show the appellate courts that the judge took *due regard* of the parties' estates." *Cohen*, 100 N.C. App. at 340, 396 S.E.2d at 347-48 (first emphasis added, second emphasis in original). The trial court's findings fall far short of the statutory mandate.

Although the trial court's findings of fact comply with most of the statutory requirements, those findings are silent as to the estates of the parties. Without such findings, we cannot determine whether the Support Order is adequately supported by competent evidence and must vacate and remand for further consideration consistent herewith. As a result of such a remand, Father's arguments on appeal regarding the amount of child support he was ordered to pay (sections V and VI in his brief) would be moot and should be dismissed.

**C. Wilfred's Monthly Expenses**

Father's next argument on appeal is that the trial court failed to consider the expenses he incurred for Wilfred during visitations and therefore abused its discretion by not giving Father a visitation credit, which is a credit to the obligor for expenses incurred for the benefit of the minor child during visitation. It is important to note that Father tries to avoid framing his argument on this issue as seeking a visitation credit, but that would be the ultimate effect of ruling for Appellant on this issue.

We afford trial courts wide latitude in deciding whether a visitation credit is appropriate. *Jones v. Jones*, 52 N.C. App. 104, 109, 278 S.E.2d 260, 264 (1981) ("The trial court has a wide discretion in deciding initially whether justice requires that a credit be given under the facts of each case and then in what amount the credit is to be awarded."); *Goodson v. Goodson*, 32 N.C. App. 76, 81, 231 S.E.2d 178, 182 (1977) (superseded by statute on other grounds) (holding that a visitation credit may be allowed "when equitable considerations exist which would create an injustice if credit were not allowed. Such a determination necessarily must depend upon the facts and circumstances in each case."). Our caselaw also dictates that visitation credits are permitted only where justice requires a credit for the obligor. See *Brinkley v. Brinkley*, 135 N.C. App. 608, 612, 522 S.E.2d 90, 93 (1999) (noting "the imposition of

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a credit is not an automatic right”). Generally, that might be the case where the non-custodial parent has the child for more than a third of the year. *Cohen*, 100 N.C. App. at 346, 396 S.E.2d at 351 (1990).

Here, Father has custody of the minor child for eight overnights a month and on various holidays. The trial court’s “ultimate goal” in setting the custody schedule was to provide Father with “40% of the overnights each month.” In reviewing this issue for abuse of discretion, we must be satisfied that “[t]he trial court [has made] sufficient findings of fact and conclusions of law to allow the reviewing court to determine whether a judgment, and the legal conclusions that underlie it, represent a correct application of the law.” *Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682. I am not satisfied Father has shown the trial court’s decision on this issue is manifestly unsupported by reason, as it did not make any findings of fact or conclusions of law that allow us to review this issue. On remand, we must direct the trial court to make specific findings regarding this issue to clarify its decision. *See, e.g., Embler v. Embler*, 159 N.C. App. 186, 189, 582 S.E.2d 628, 630-31 (2003) (remanding “for further findings” without holding the trial court committed error or abused its discretion).

**D. Father’s Monthly Expenses**

Next, Father argues the trial court erroneously found, in Finding 18, that he incurs reasonable and necessary monthly expenses for himself in the amount of \$9,813.00 per month. The trial court reached this finding by taking the amount Father claimed as his reasonable and necessary monthly expenses in his financial affidavit (\$14,812.68) less (1) \$3,000.00 of the \$3,974.00 in “Professional fees (CPA, Attorney Fees, etc.)” listed therein, which the trial court found was related primarily to this litigation rather than any ongoing monthly expense, and (2) the \$2,000.00 listed under “Retirement/Investment[,]” which had already been accounted for as a voluntary deduction from Father’s gross income. N.C. Child Support Guidelines, AOC-A-162, Rev. 8/15, 3 (2015) (defining “gross income” as “income before deductions for . . . retirement contributions, or other amounts withheld from income”). That left the court with the following equation:

$$\$14,812.68 - \$3,000.00 - \$2,000.00 = \$9,812.68.$$

Again, “our review is limited to a determination [of] whether the trial court abused its discretion. Under this standard of review, the trial court’s ruling will be overturned only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision.” *Spicer*, 168 N.C. App. at 287, 607 S.E.2d at 682 (internal citation omitted). Finding 18, regarding Father’s reasonable and necessary monthly

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expenses, is not manifestly unsupported by reason. The trial court explained exactly how it reached that figure and its analysis is legally sound. Finding 18 is properly affirmed.

**E. Wilfred's Primary Residence**

Finally, Father argues the trial court erred by finding Wilfred had resided primarily with Mother on a "Worksheet A" schedule since 30 November 2016 and that, pursuant to the Permanent Child Custody Order, Mother would continue to exercise "Worksheet A" primary custody of the minor child. Father's argument is purely semantic and incorrect; he contends the trial court's reference to "Worksheet A" indicates improper reliance on the Child Support Guidelines rather than the factors governing high income cases.

It is clear from the record the trial court's reference to "Worksheet A" in Finding 8 was shorthand for the fact that Wilfred resided primarily with Mother for at least 243 overnights per year. This reference does not, as Father alleges, reveal that the trial court was improperly influenced by the guidelines instead of the factors for high income cases. *Meehan*, 166 N.C. App. at 383, 602 S.E.2d at 30 (stating the trial court's order for child support in a high-income case "must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount"). This is apparent from the trial court's other Findings of Fact and Conclusions of Law, all of which are appropriate for a high-income case rather than a traditional child support matter governed by the guidelines and calculated pursuant to Worksheet A. The trial court's use of the term "Worksheet A" custody in Finding 8 was imprecise but, despite Father's argument to the contrary, its use of that term is not indicative of an abuse of discretion.

**CONCLUSION**

The trial court failed to consider the parties' estates in reaching its conclusion regarding Father's child support payments. Such a finding is required, and we must vacate that portion of the trial court's order and remand for further consideration. We should also direct the trial court to reconsider its findings and conclusions regarding a potential visitation credit for Father. In all other regards, the trial court's order should be affirmed. For these reasons, I respectfully concur in part and dissent in part.

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RENE ROBINSON, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE  
ESTATE OF VELVET FOOTE, PLAINTIFFS

v.

HALIFAX REGIONAL MEDICAL CENTER; DR. JUDE OJIE, DR. SIMBISO RANGA, AND  
MEGAN ORREN ROGERSEN, INDIVIDUALLY AND AS EMPLOYEES, AGENTS, OF HALIFAX  
REGIONAL MEDICAL CENTER, DEFENDANTS

No. COA18-1300

Filed 21 April 2020

**1. Wrongful Death—medical malpractice—Rule 9(j) compliance—facial validity**

In a wrongful death action based on medical malpractice, the trial court prematurely dismissed plaintiffs' complaint against two doctors for lack of compliance with Civil Procedure Rule 9(j), prior to discovery being conducted, because, as the trial court itself noted, the complaint on its face met the certification requirements. Assuming the trial court appropriately considered plaintiffs' motion to identify their 9(j) expert, which included the expert's curriculum vitae (CV), nothing in the motion or CV contradicted plaintiffs' certification assertions in the complaint and therefore could not have supported the decision to dismiss.

**2. Negligence—res ipsa loquitur—broken jaw—sufficiency of allegations—applicability of Rule 9(j)**

In a wrongful death action, plaintiffs' personal injury claim asserted against a nurse under the doctrine of *res ipsa loquitur* was properly dismissed where plaintiffs' allegations failed to show the decedent's injury, a broken jaw suffered while decedent was in the hospital and under the nurse's care, was the type of injury that could only occur due to a negligent act or omission of the nurse. Therefore, the claim required a Rule 9(j) certification under the Rules of Civil Procedure, but plaintiffs' failure to include Rule 9(j) allegations regarding the nurse's actions or the broken jaw subjected the claim to dismissal.

**3. Statutes of Limitation and Repose—wrongful death—voluntary dismissal—tolling period—new claim not asserted in first complaint**

In a wrongful death action, plaintiffs' claim against a nurse was barred by the two-year statute of limitations for wrongful death actions based on medical malpractice (N.C.G.S. § 1-53(4)) where plaintiffs' initial action, timely filed within two years of decedent's

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death, only included claims against other defendants but not the nurse. Therefore, the tolling provision of Civil Procedure Rule 41(a), invoked when plaintiffs took a voluntary dismissal, only applied to claims asserted in the initial complaint and not the claim against the nurse that was added to the re-filed complaint.

**4. Wrongful Death—claims against hospital—respondeat superior—Rule 9(j) compliance—facial validity**

In a wrongful death action based on medical malpractice, plaintiffs' claims against the hospital (based on the doctrine of respondeat superior and a theory of corporate negligence) were prematurely dismissed, before discovery was conducted, after the trial court determined plaintiffs failed to comply with Civil Procedure Rule 9(j), because the complaint on its face contained the necessary certification allegations.

**5. Appeal and Error—notice of appeal—jurisdiction—limited to order appealed from**

In a wrongful death action, the Court of Appeals lacked jurisdiction to review plaintiffs' arguments related to their Rule 59 and 60 motions (filed after the trial court dismissed their complaint) where plaintiffs' notice of appeal only referenced the order dismissing their complaint.

Judge BERGER concurring by separate opinion.

Appeal by Plaintiffs from order entered 23 May 2018 by Judge Alma Hinton in Halifax County Superior Court. Heard in the Court of Appeals 8 May 2019.

*Richard E. Batts, PLLC, by Richard E. Batts, for Plaintiffs-Appellants.*

*Harris, Creech, Ward & Blackerby, PA, by Christina J. Banfield, C. David Creech, and Jay C. Salsman, for Defendants-Appellees.*

DILLON, Judge.

Plaintiffs appeal from the trial court's order granting Defendants' motion to dismiss Plaintiffs' complaint. We affirm in part and reverse in part.

**I. Background**

Plaintiff Rene Robinson is the daughter of Velvet Foote, deceased, and the administratrix of Ms. Foote's estate. On 15 January 2015, Ms.



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Foote died at Halifax Regional Medical Center (the “Hospital”), where she had been attended by Drs. Jude Ojie and Simbiso Ranga (the “Doctors”) and Nurse Megan Orren Rogersen.

Two years and two days later, on 17 January 2017, Plaintiffs brought a wrongful death action against the Hospital and the Doctors.<sup>1</sup> However, six months later, Plaintiffs voluntarily dismissed that first action.

On 16 January 2018, Plaintiffs, represented by a different attorney, filed this present wrongful death action against the Doctors and the Hospital, but added Nurse Rogersen as a defendant. Also, Plaintiffs added a tort claim against Nurse Rogersen for a broken jaw injury Ms. Foote suffered while at the Hospital.

Defendants moved to dismiss Plaintiffs’ claims. Defendants’ motion was largely based on their contention that Plaintiffs did not comply with Rule 9(j) of our Rules of Civil Procedure. After a hearing on the matter, the trial court granted Defendants’ motion. Plaintiffs timely appealed.

## II. Analysis

## A. Claims Against the Doctors – Rule 9(j) Compliance

[1] In its order, the trial court dismissed the wrongful death claims against the Doctors and the Hospital based on Plaintiffs’ failure to comply with Rule 9(j) of our Rules of Civil Procedure. Based on our reasoning below, we hold that the trial court erred in dismissing Plaintiffs’ claims against the Doctors based on a failure to comply with Rule 9(j) *at this stage of the litigation*. In short, Plaintiffs’ complaint complies with Rule 9(j) and there has been no discovery conclusively establishing that Plaintiffs were not reasonable in expecting their Rule 9(j) expert would qualify as an expert at the time they filed their complaint. Our holding should not be construed to foreclose a Rule 9(j) dismissal if future discovery justifies such dismissal.<sup>2</sup>

Rule 9(j) requires a plaintiff alleging a medical malpractice claim to specifically plead in her complaint that the medical care and all

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1. The statute of limitations for a wrongful death action is two years. N.C. Gen. Stat. § 1-53(4) (2014). The day the first complaint was filed, 17 January 2017, was the day after Martin Luther King, Jr., Day.

2. Plaintiffs argue an alternate ground to support the trial court’s dismissal, a ground not relied upon by the trial court; namely, that no Rule 9(j) certification was necessary because the Doctors had committed *intentional* torts in causing Ms. Foote’s death when they placed DNR orders in Ms. Foote’s file. Plaintiffs contend that, therefore, Ms. Foote’s death was not caused by the provision of medical care. However, based on our resolution of the 9(j) issue, we need not reach this issue.

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medical records pertaining to the care available to the plaintiff have been reviewed by a person who is reasonably expected to qualify as an expert witness under Rule 702 of the Rules of Evidence and who is willing to testify that the medical care did not comply with the applicable standard of care. N.C. Gen. Stat. § 1A-1, Rule 9(j) (2014).

Here, Plaintiffs filed two documents at the commencement of this action. First, Plaintiffs filed their complaint. This complaint contains the required Rule 9(j) language, alleging that “[t]he medical care and all medical records pertaining to the alleged negligence that are available to the Plaintiffs . . . have been reviewed by a person who is reasonably expected to qualify as a witness under Rule 702 . . . and who is willing to testify that the medical care did not comply with the applicable standard of care,” and that the review occurred prior to 17 January 2017,<sup>3</sup> when the first complaint was filed.

Second, Plaintiffs filed a motion which identified their Rule 9(j) expert as Dr. Edward Mallory and sought to qualify him as an expert to testify at trial under Rule 702 of our Rules of Evidence. Attached to the motion was a one-page *curriculum vitae* (“CV”) of Dr. Mallory. This CV outlined Dr. Mallory’s career as an accomplished *emergency room doctor* in Florida, where he lived. (Plaintiffs’ complaint referenced to this motion to qualify.)

Before filing an answer or engaging in any discovery, Defendants moved to dismiss Plaintiffs’ complaint. Defendants also filed and served an affidavit from each of the Doctors, in which each averred that he was not an emergency room doctor, but rather an internist and hospitalist, and did not provide any care to Ms. Foote in the capacity of an emergency room doctor.

After a hearing on Defendants’ motion to dismiss, the trial court entered its order. In its dismissal order, the trial court stated that it was relying on the complaint; Plaintiffs’ unverified motion to qualify Dr. Mallory, including Dr. Mallory’s CV; “the materials submitted by the

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3. Our Supreme Court has held that the Rule 9(j) expert must have conducted his review prior to the running of the statute of limitations. *See Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (explaining that review must occur before filing the complaint); *see also Vaughan v. Mashburn*, 371 N.C. 428, 438-39, 817 S.E.2d 370, 377-78 (2018) (clarifying that where the plaintiff takes advantage of a procedural rule that allows her to file a complaint after the running of the statute of limitations, then the pleading must allege that the Rule 9(j) expert review occurred before the running of said statute of limitations). Our Supreme Court’s holding in *Vaughan* is consistent with its holdings in prior opinions from that Court as explained in *Boyd v. Rekuc*, 246 N.C. App. 227, 782 S.E.2d 916 (2016).

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parties,” which presumably were the affidavits of the Doctors; and the arguments of counsel.<sup>4</sup>

The trial court concluded that Plaintiffs’ complaint *on its face* regarding Dr. Mallory’s review does comply with Rule 9(j), stating that “Plaintiffs did include a certification, which on its face meets the requirements of Rule 9(j)[.]”

However, the trial court, nonetheless, dismissed Plaintiffs’ claims for three reasons: (1) the CV attached to Plaintiffs’ unverified motion showed that Dr. Mallory practiced in a different specialty than the Doctors’ specialty as indicated in their affidavits; (2) there was nothing in the CV or otherwise which indicated that Dr. Mallory was familiar with the standard of care in Halifax County; and (3) there was nothing in the CV or otherwise which indicated that Dr. Mallory had experience admitting patients into a hospital or entering DNR orders to patients admitted to hospitals:

[B]ased on the information submitted to the Court contained in Plaintiff[s’] Complaint and Motion [to qualify Dr. Mallory as a Rule 702 expert], the Court finds that [Dr. Mallory] is an emergency room physician, and that Defendants [Doctors] practice internal medicine as hospitalists[.] Accordingly, Dr. Mallory does not practice in the same specialty as Defendant [Doctors].

. . . The Court further finds that nothing submitted with Plaintiff[s’] Motion [to qualify Dr. Mallory as a Rule 702 expert] indicates that Dr. Mallory is or could be familiar with the standard of care for internal medicine physicians in Halifax County or similarly situated communities, and further nothing indicates that Dr. Mallory has experience in admitting patients or entering [DNR] Orders for patients admitted to hospitals, both of which constitute the substance of Plaintiff[s’] claim against [the Doctors].

Further, Plaintiffs have neither alleged or demonstrated any extraordinary circumstances that would justify the Court qualifying Dr. Mallory under Rule 702(e). The Court

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4. Specifically, the order states that the trial court was relying on “the pleadings, including Plaintiff[s’] Motion to Qualify [Dr. Mallory as an] Expert Witness and the documents attached thereto, [ ] other materials submitted by the parties and upon hearing argument of counsel[.]” The only “document[ ]” attached to Plaintiffs’ Motion was a one-page CV of Dr. Mallory. The only “other materials” that are part of the record before us are the affidavits of the Doctors.

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specifically finds that Plaintiffs could not have reasonably expected that Dr. Mallory would qualify under Rule 702[,] and therefore [she has] not complied with Rule 9(j)[.]

In so ruling, as explained below, we conclude that the trial court “jumped the gun” in determining that Plaintiffs failed to comply with Rule 9(j).

Our Supreme Court has explained that Rule 9(j) is a gatekeeping rule and should be viewed differently than a motion to qualify an expert under Rule 702:

Rule 9(j) serves as a gatekeeper, enacted by the legislature, to prevent frivolous malpractice claims by requiring expert review *before* filing of the action. Rule 9(j) thus operates as a preliminary qualifier to control pleadings rather than to act as a general mechanism to exclude expert testimony. Whether an expert will ultimately qualify to testify [at trial] is controlled by Rule 702. The trial court has wide discretion to allow or exclude testimony under that [Rule 702].

However, the preliminary, gatekeeping question of whether a proffered expert witness is reasonably expected to qualify as an expert witness under Rule 702 is a different inquiry from whether the expert *will actually* qualify under Rule 702.

*Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (emphasis in original) (internal quotation marks and citation omitted). That is, under Rule 9(j), to get past the gate into the courthouse, a plaintiff must have the opinion of an expert *who at the time she files her complaint she reasonably expects will qualify* under Rule 702. However, once in the courtroom, the plaintiff (typically) must offer the opinion of an expert who, in fact, qualifies under Rule 702 to get to the jury. Accordingly, it is possible for a plaintiff to get through the initial pleading Rule 9(j) gate with one expert and then later, even if the trial judge rules that her Rule 9(j) expert does not qualify under Rule 702, for that plaintiff to satisfy her burden of proof at trial through the testimony of another expert.

To comply with Rule 9(j), our Supreme Court instructs that the plaintiff must have exercised “reasonable diligence under the circumstances” to formulate a reasonable belief at the time she files her complaint that her certifying expert will qualify under Rule 702. *Id.* at 31, 726 S.E.2d at 817.

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A plaintiff's complaint is certainly subject to dismissal *if* the pleading *on its face* does not comply with Rule 9(j), akin to a Rule 12(b)(6) dismissal. *See Thigpen v. Ngo*, 355 N.C. 198, 202, 558 S.E.2d 162, 165 (2002) (requiring dismissal when the plaintiff's pleading is not in compliance with the Rule's requirements). For instance, in *Vaughan* our Supreme Court held that an amended complaint which fails to plead that the expert review occurred before the statute of limitations ran must be dismissed, construing the language in Rule 9(j) that the medical care and records "have been reviewed":

Next, we addressed an issue for which we granted discretionary review . . . whether an amended complaint which fails to allege that review of the medical care in a medical malpractice action took place before the filing of the original complaint satisfies the requirements of Rule 9(j). Consistent with our prior discussion of legislative intent, we held that it does not.

*Vaughan*, 371 N.C. at 439, 817 S.E.2d at 377 (internal citation omitted). And our Court has held that a complaint which pleads that the certifying expert only reviewed "certain" medical records instead of "all" medical records as required by Rule 9(j) must be dismissed. *Fairfield v. WakeMed*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 821 S.E.2d 277, 281 (2018) (Judge, now Justice, Davis, writing for the Court).

Also, our Supreme Court instructed that "even when a complaint facially complies with Rule 9(j) by including a statement pursuant to Rule 9(j), if discovery subsequently establishes that the statement is not supported by the facts, then dismissal is likewise appropriate[.]" akin to a Rule 56 summary judgment. *Ford v. McCain*, 192 N.C. App. 667, 672, 666 S.E.2d 153, 157 (2008).

For example, if discovery shows that the plaintiff's expectation was not reasonable that her Rule 9(j) expert would qualify as an expert under Rule 702, based on what she reasonably should have known at the time she filed her complaint, her complaint must be dismissed for failing to satisfy the gatekeeping requirement, irrespective of whether she later procures a Rule 702-qualified expert. The Court explained that a dismissal at this summary judgment-like stage, though, should be rare, instructing that the trial court is to draw all reasonable inferences from the discovery in favor of the plaintiff and only dismiss based on discovery if "no reasonable person" would have relied on the expert based on what was known when the complaint was filed:

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[T]o evaluate whether a party reasonably expected its proffered expert witness to qualify under Rule 702, the trial court must look to all the facts and circumstances that were known or should have been known by the party at the time of filing.

Though the party is not necessarily required to know all the information produced during discovery at the time of filing, the trial court will be able to glean much of what the party knew or should have known from subsequent discovery materials.

But to the extent there are *reasonable* disputes or ambiguities in the forecasted evidence, the trial court **should draw all reasonable inferences in favor of the nonmoving party at this preliminary stage** of determining whether the party *reasonably expected* the expert witness to qualify under Rule 702.

When the trial court determines that [the plaintiff's] reliance on [its proffered expert] was not reasonable, the court must make written findings of fact to allow a reviewing appellate court to determine whether those findings are supported by competent evidence. . . . We note that because a trial court is not generally permitted to make factual findings at the summary judgment stage, **a finding that reliance on a fact or inference is not reasonable will occur only in the rare case in which no reasonable person would so rely.**

*Moore*, 366 N.C. at 32, 726 S.E.2d at 817-18 (emphasis added in bold) (internal quotation marks and citation omitted).<sup>5</sup>

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5. There are a number of cases from our Court which are arguably at odds with the holding in our Supreme Court's *Moore* opinion, that a trial judge is to draw all reasonable inferences in favor of the plaintiff. Specifically, in *Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, our Court held that a trial judge had no duty to review matters outside the complaint in the light most favorable to the plaintiff when considering a Rule 9(j) dismissal motion. 197 N.C. App. 238, 256, 677 S.E.2d 465, 477 (2009). See also *McGuire v. Riedle*, 190 N.C. App. 785, 787-88, 661 S.E.2d 754, 757 (2008). In any event, we apply *Moore*.

And in further support of our holding here, we note that our Supreme Court has recently affirmed the standard articulated in *Moore*, holding that the trial court is to view the evidence "in the light most favorable to plaintiff" and that the appellate court should conduct a *de novo* review, not "deferring [ ] to the findings of the trial court." *Preston v. Movahed*, \_\_\_ N.C. \_\_\_, \_\_\_ (2020), 2020 N.C. LEXIS 272, at \*17 (reversing dismissal of complaint based on Rule 9(j)). As of the filing of our opinion here, however, the mandate for *Preston* has not yet issued.

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In the present case, the trial court did consider matters outside the face of the complaint, such as the Doctor's affidavits and Dr. Mallory's CV which was attached to Plaintiffs' unverified motion to qualify Dr. Mallory under Rule 702. But at this hearing, Plaintiffs' motion to qualify Dr. Mallory was not before the trial court, just Defendants' Rule 9(j) dismissal motion. At the hearing, Defendants established that the Doctors were internists and hospitalists and reiterated that Plaintiffs' complaint against them was based on their failure to admit Ms. Foote into the Hospital more quickly once Ms. Foote presented herself to the Hospital's emergency room and to properly care for her once she was admitted.

Assuming, *arguendo*, it was appropriate for the trial court to consider Dr. Mallory's CV attached to an unverified motion at the hearing,<sup>6</sup> there was nothing in the CV which contradicted the assertion made in Plaintiffs' Rule 9(j) statement in their complaint. Though the CV outlined Dr. Mallory's extensive experience as an emergency room doctor, there is nothing in the CV which conclusively demonstrates that he has no expertise as an internist or hospitalist or otherwise that his expertise as an emergency room doctor does not include "the performance of the procedure that is the subject of the complaint and [ ] prior experience treating similar patients." N.C. Gen. Stat. § 8C-1, Rule 702(b)(1)(b) (2014).

Further, there is nothing in the CV to contradict Plaintiffs' assertion in their complaint that Dr. Mallory is familiar with the applicable standard of care, notwithstanding that the CV only indicates that Dr. Mallory practices in Florida. It just may be that Plaintiffs' expert has familiarity with the standard of care in Halifax County. *See Crocker v. Roethling*, 363 N.C. 140, 675 S.E.2d 625 (2009) (holding that summary judgment was inappropriate where plaintiff's expert, an Arizona doctor, testified that he had reviewed information concerning medical care in Goldsboro and was, thus, familiar with the standard of care in Goldsboro).

But it may alternatively be that discovery will, indeed, demonstrate that Plaintiffs should have not reasonably believed that their expert would qualify under Rule 702. Indeed, after deposing Dr. Mallory or conducting other discovery, Defendants may be able to show that when Plaintiffs filed their complaint, they could not have reasonably expected Dr. Mallory to qualify, at which point, dismissal under Rule 9(j) would be appropriate. However, at this point, Defendants have simply not

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6. It could be argued that consideration of the CV was appropriate since it was attached to a motion filed by Plaintiffs and that motion, otherwise, was referred to in Plaintiffs' complaint.



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met their burden of showing that they are entitled to a dismissal under Rule 9(j). The trial court must reasonably infer that it was reasonable for Plaintiffs to expect Dr. Mallory would qualify as an expert under Rule 702, as they allege in their complaint, unless and until the discovery shows, even in the light most favorable to them, that they could not have so reasonably expected.

B. Personal Injury Claim Against Nurse Rogersen – *Res Ipsa Loquitur*

**[2]** Plaintiffs asserted a personal injury claim under the doctrine of *res ipsa loquitur* against Nurse Rogersen arising from Ms. Foote's broken jaw, an injury which was discovered during Ms. Foote's autopsy. Plaintiffs do not allege how Ms. Foote's jaw came to be broken, but only that it became broken while in Nurse Rogersen's care. The trial court dismissed this claim, concluding that Plaintiffs had "failed to state an actionable *res ipsa loquitur* claim" as to negate the heightened pleading requirements pursuant to Rule 9(j). We conclude that the trial court did not err in its ruling.

Certification under Rule 9(j) is not required in a medical malpractice action where "[t]he pleading alleges facts establishing negligence under the existing common-law doctrine of *res ipsa loquitur*." N.C. Gen. Stat. § 1A-1, Rule 9(j)(3). This Court "consider[s] *de novo* whether [a plaintiff's] complaint alleges facts establishing negligence under the doctrine of *res ipsa loquitur* pursuant to Rule 9(j)(3)." *Robinson v. Duke Univ. Health Sys.*, 229 N.C. App. 215, 224, 747 S.E.2d 321, 328 (2013).

For the doctrine to apply, the plaintiff must, in part, "allege facts from which a layperson could infer negligence by the defendant based on common knowledge and ordinary human experience." *Id.* at 224, 747 S.E.2d at 329; see *Howie v. Walsh*, 168 N.C. App. 694, 698, 609 S.E.2d 249, 252 (2005) ("[I]n order for the doctrine to apply, not only must [the] plaintiff have shown that the injury resulted from [the] defendant's . . . act, but [the] plaintiff must be able to show—without the assistance of expert testimony—that the injury was of a type not typically occurring in the absence of some negligence by [the] defendant.").

In the instant case, the allegations of Plaintiffs' complaint fail to demonstrate that the broken jaw suffered by Ms. Foote is the type of injury that would not ordinarily occur but for some negligent act or omission by an attending nurse. There may be any number of circumstances under which a broken jaw could occur in an elderly patient at a hospital, despite the provider's most diligent adherence to the applicable standard of care. Such determinations are not appropriately subject to inference based on a jury's common knowledge or experience, but instead



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fall squarely within those classes of situations in which reference to at least some degree of expert medical testimony is required. We, therefore, agree with the trial court that Plaintiffs' complaint fails to state a personal injury claim against Nurse Rogersen under this doctrine.

And because the trial court properly concluded that Plaintiffs' personal injury claim was not actionable under *res ipsa loquitur*, certification under Rule 9(j) was required. Plaintiffs' Rule 9(j) certification contains no Rule 9(j) allegations pertaining to Nurse Rogersen or Ms. Foote's broken jaw. Therefore, the trial court did not err in dismissing Plaintiffs' personal injury claim against Nurse Rogersen.

C. Wrongful Death Claim Against Nurse Rogersen –  
Statute of Limitations

[3] Plaintiffs asserted a wrongful death claim against Nurse Rogersen in their second complaint filed three years after Ms. Foote's death.

Wrongful death actions based on medical malpractice are subject to a two-year statute of limitations, which accrues as of the date of death. N.C. Gen. Stat. § 1-53(4) (2014). However, where an action is commenced within the applicable statute of limitations period and the plaintiff subsequently takes a voluntary dismissal pursuant to Rule 41(a), the plaintiff may refile the same action within one year. N.C. Gen. Stat. § 1A-1, Rule 41(a)(1). "The effect of this provision is to extend the statute of limitations by one year after a voluntary dismissal." *Staley v. Lingerfelt*, 134 N.C. App. 294, 298, 517 S.E.2d 392, 395 (1999).

Rule 41(a)'s tolling provision, however, does not apply to claims that were not asserted in the first complaint. *Estate of Savino v. Charlotte-Mecklenburg Hosp. Auth.*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 822 S.E.2d 565, 577 (2018). "If the actions are fundamentally different or not based on the same claims, the new action is not considered a continuation of the original action, and Rule 41(a) may not be invoked." *Brannock v. Brannock*, 135 N.C. App. 635, 640, 523 S.E.2d 110, 113 (1999) (internal quotation marks and citation omitted).

Here, Plaintiffs' first complaint was filed within two years of Ms. Foote's death. However, their first complaint did not allege *any* claims against Nurse Rogersen, as she was not named as a defendant in that action. Therefore, Plaintiffs' wrongful death claim against Nurse Rogersen was properly dismissed.

D. Claims Against the Hospital

[4] Next, Plaintiffs sought to hold the Hospital liable for Ms. Foote's death based on the doctrine of *respondeat superior* and on a "corporate

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negligence” theory. The trial court dismissed Plaintiffs’ *respondeat superior* claim on the grounds that they failed to comply with Rule 9(j). As we held that the trial court “jumped the gun” on the Rule 9(j) issue, we hold that the trial court erred in dismissing the claims against the Hospital. *See Blanton v. Moses H. Cone Mem. Hosp.*, 319 N.C. 372, 374-76, 354 S.E.2d 455, 457-58 (1987) (discussing a hospital’s liability under the theories of *respondeat superior* and corporate negligence).

## E. Remaining Issues

Plaintiffs also asserted a personal injury claim for injuries that *they* allegedly suffered as a result of Defendants’ treatment of Ms. Foote, which the trial court dismissed pursuant to Rule 12(b)(6). Because Plaintiffs do not contest the trial court’s dismissal of this claim on appeal, any potential challenges thereto have been abandoned. *See* N.C. R. App. P. 28(a) (“Issues not presented and discussed in a party’s brief are deemed abandoned.”).

[5] Lastly, Plaintiffs present arguments in their brief relating to Rule 59 and Rule 60 motions that Plaintiffs filed following the trial court’s order dismissing their complaint. However, Plaintiffs’ notice of appeal only designates appeal from the trial court’s order granting Defendants’ motion to dismiss. Accordingly, we lack jurisdiction to address any arguments related to their motions under Rules 59 and 60. *See Chee v. Estes*, 117 N.C. App. 450, 452, 451 S.E.2d 349, 350 (1994) (“[T]he appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken.”).

## III. Conclusion

We affirm the trial court’s dismissal of all claims against Nurse Rogersen. We also affirm the trial court’s dismissal of Plaintiff Rene Robinson’s personal injury claim asserted in her individual capacity, as she has abandoned that issue on appeal.

We reverse the trial court’s dismissal of Plaintiffs’ remaining claims against the Doctors and the Hospital. This reversal does not prejudice any right Defendants may have to seek dismissal under Rule 9(j) at a later time after discovery has occurred. We remand the matter for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART.

Judge ZACHARY concurs.

Judge BERGER concurring by separate opinion.

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BERGER, Judge, concurring in separate opinion.

I concur with the majority in result only as to Section II B (*res ipsa* claim against Nurse Rogersen); Section II C (wrongful death claim against Nurse Rogersen); Section II D (claims against the hospital); and Section II E (miscellaneous remaining issues). As to Section II A, I disagree with the majority's reasoning. However, because the result will be the same upon remand, I concur in result only.

The majority concludes that the trial court should not have considered Dr. Mallory's resume, which was attached to a motion specifically referenced in Plaintiffs' amended complaint.<sup>1</sup> Although Section II A is short on citing to any legal authority, the majority seemingly concludes that a trial court should never consider evidence outside the complaint when making determinations for medical malpractice claims pursuant to Rule 12(b)(6) and Rule 9(j).

Rule 10(c) plainly states that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." N.C. Gen. Stat. § 1A-1, Rule 10(c) (2019). Moreover, "[w]hen reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true. In conducting our analysis, we also consider any exhibits attached to the complaint." *Krawiec v. Manly*, 370 N.C. 602, 606, 811 S.E.2d 542, 546 (2018) (citations and quotation marks omitted). *See also Laster v. Francis*, 199 N.C. App. 572, 577, 681 S.E.2d 858, 862 (2009) (citation and quotation marks omitted) ("When documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment. Although it is true that the allegations of plaintiff's complaint are liberally construed and generally treated as true, the trial court can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint."); *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007) (citation and quotation marks omitted) ("[T]his Court has held that when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant.").

The majority is stuck on the notion that discovery must be conducted before the trial court can rule on a defendant's Rule 12(b)(6)

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1. However, the majority appears unsure of its reasoning with its contradictory statement in footnote 6.

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motion. Under the majority's reasoning, the certification requirement in Rule 9(j) becomes meaningless, and litigation costs associated with frivolous claims would explode.

"Rule 9(j) serves as a gatekeeper . . . to prevent frivolous malpractice claims." *Estate of Wooden v. Hillcrest Convalescent Ctr., Inc.*, 222 N.C. App. 396, 401, 731 S.E.2d 500, 504 (2012). The Rule 9(j) certification requirement would not have any teeth if plaintiffs could simply parrot the boilerplate language and then wait until after discovery to speak with their purported expert. Attorneys would be given license to sign pleadings with Rule 9(j) certifications even if the attorneys had not spoken with an expert.

This is exactly what happened here.

On August 22, 2018, Plaintiffs' Rule 60 motion was heard in the trial court. Plaintiffs' counsel was asked by the trial court if he had spoken with Dr. Mallory about his qualifications. Plaintiffs' counsel responded, "I have not talked to him. But the person who filed the [original] complaint talked to him, which he was required to do before filing the complaint, and that he did."<sup>2</sup> The trial court then asked:

THE COURT: Before you signed this complaint filed in March of this year, did you speak with Dr. Mallory?

[Plaintiffs' Counsel]: I did not.

Defendants argued to the trial court that, among other things, Plaintiffs' counsel never spoke with Dr. Mallory prior to filing the amended complaint. At the conclusion of Defendants' argument, the trial court again asked Plaintiffs' counsel if he had spoken with Dr. Mallory prior to filing the amended complaint. Plaintiffs' counsel responded:

[Plaintiffs' Counsel]: Your honor, I did talk to Dr. - - I mean, what I - -

THE COURT: You did talk to who[m]?

[Plaintiffs' Counsel]: I did talk to Dr. Mallory.

THE COURT: Did you not just tell me you didn't talk to him?

[Plaintiffs' Counsel]: I made a note here to stand up and clarify that to the Court. I made a note when I -- as I was

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2. The original complaint contained a defective Rule 9(j) certification.

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sitting here and sat here for a moment and I remembered that – I didn't talk to him about – I merely called him on the phone to chat with him. I just wanted to clarify that. I called him on the phone, and I chatted with him a couple of times. But the information regarding the review of the records, that took place by [plaintiffs' former attorney], not by me.

THE COURT: You had a general conversation?

[Plaintiffs' Counsel]: I had a general conversation.

THE COURT: But not about the case?

[Plaintiffs' Counsel]: About the case but not the medical record.

THE COURT: Not anything to gain your – help your reasonableness in relying on him as an expert?

[Plaintiffs' Counsel]: Your Honor, I relied upon the attorney who brought the case to me. And I talked to him. Again, I verified that Dr. Mallory existed, because I talked to him on the phone more than once.

Plaintiffs' counsel acknowledged that he relied on the defective Rule 9(j) certification in the original complaint, and never spoke with Dr. Mallory about his qualifications.<sup>3</sup> This may explain why Plaintiffs alleged in the amended complaint that their expert “*specialize[d] in the same specialty of internal medicine*, a general practitioner, as [Drs. Ojie and

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3. Plaintiffs' counsel filed a memorandum of law in opposition to Defendants' motion to dismiss which stated:

Plaintiff Robinson and her attorney reviewed the provided Vitae of Dr. Mallory *and talked to him over the telephone* during his review of provided medical records and concluded his area of medical specialty entails the same as that of the medical doctors complained of and is eminently qualified to testify about the decision-making process required before entering a DNR[.]

...

It was reasonable for Plaintiffs to conclude *from talking to Dr. Mallory and from information that he provided them that his active clinical practice was of the same specialty or a similar specialty which includes within its specialty the performance of the procedures that subject (sic) of the complaint* and have prior experience treating similar patients.

(Emphasis added).

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Ranga].” (Emphasis added). Plaintiffs’ expert was not a specialist in internal medicine. Rather, he was a purported expert in emergency medicine.

As specifically referenced in the amended complaint, Plaintiffs attached a motion pursuant to Rule 702(e) to the complaint seeking to use Dr. Mallory as their expert. Plaintiffs alleged in their motion that Dr. Mallory had “over 25 years of being an attending physician in Emergency Medicine, as it continues to be his line of work; also, since 2014, he provides his expertise and services as a medical expert for jury trials. SEE EXHIBIT A – RESUME OF DR. EDWARD MALLORY.”

Dr. Mallory’s resume stated that his experience was as owner and president of “Emergency Expert for You.com,” and that he had experience as an attending physician in emergency medicine and pediatric emergency medicine. He is board certified in emergency medicine. Dr. Mallory’s education included a residency in emergency medicine and an internship and medical degree in osteopathic medicine. Thus, Plaintiffs’ complaint, on its face, provided contradictory information concerning the expert that they had certified conducted the review of Plaintiff’s records. Further, despite Plaintiffs’ counsel’s admission that he had never spoken with Dr. Mallory about his qualifications, Plaintiffs’ complaint alleged that they reasonably believed Dr. Mallory would qualify as an expert witness.

Again, Rule 9(j) serves a gate-keeping function. This Rule was “enacted by the legislature[] to prevent frivolous malpractice claims by requiring expert review *before* filing of the action.” *Moore v. Proper*, 366 N.C. 25, 31, 726 S.E.2d 812, 817 (2012) (emphasis in original).

In considering whether a plaintiff’s Rule 9(j) statement is supported by the facts, a court must consider the facts relevant to Rule 9(j) and apply the law to them. In such a case, this Court does not inquire as to whether there was any question of material fact, nor do we view the evidence in the light most favorable to the plaintiff. Rather, our review of Rule 9(j) compliance is *de novo*, because such compliance clearly presents a question of law.

*Barringer v. Wake Forest Univ. Baptist Med. Ctr.*, 197 N.C. App. 238, 255-56, 677 S.E.2d 465, 477 (2009) (citations and quotation marks omitted). “When ruling on a motion to dismiss pursuant to Rule 9(j), a court must consider the facts relevant to Rule 9(j) and apply the law to them.” *Estate of Wooden*, 222 N.C. App. at 403, 731 S.E.2d at 506 (citation and quotation marks omitted).

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Plaintiffs' amended complaint alleges medical malpractice for which a proper Rule 9(j) certification was required. Plaintiffs' counsel acknowledged that he did not comply with Rule 9(j). The record demonstrates that the Rule 9(j) certification was defective. An attorney cannot reasonably expect their expert to qualify as an expert for purposes of Rule 9(j) when that attorney has never spoken with the purported expert about his qualifications. Even if we assume the trial court "jumped the gun," the admissions by counsel demonstrate that Plaintiffs were not prejudiced by any possible error. The end result when the next round of costly motions are filed will again be in Defendants' favor.

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STATE OF NORTH CAROLINA

v.

KELVIN ALPHONSO ALEXANDER, DEFENDANT

No. COA19-202

Filed 21 April 2020

**1. Criminal Law—post-conviction relief—DNA testing—availability after guilty plea**

Defendant's guilty plea to second-degree murder did not disqualify him from post-conviction DNA testing pursuant to N.C.G.S. § 15A-269(b)(2). Although that section requires a "reasonable probability that a verdict would have been more favorable" had DNA testing been done, and there is no verdict after a guilty plea, the General Assembly intended for "verdict" to be broadly construed to mean "resolution," "judgment," or "outcome." Further, there is a reasonable probability an innocent defendant would not have pleaded guilty to second-degree murder to avoid a first-degree murder conviction if DNA evidence had been available pointing to someone else as the killer.

**2. Criminal Law—post-conviction relief—DNA testing—materiality**

The trial court properly denied defendant's motion for post-conviction DNA testing (after pleading guilty to second-degree murder) for lack of materiality where there was substantial evidence of defendant's guilt, and where the fact that two people were involved in the killing meant that any DNA found could have come from an accomplice and would not necessarily exonerate defendant.

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Judge BERGER concurring by separate opinion.

Appeal by Defendant from order entered 1 October 2018 by Judge Henry W. Hight, Jr., in Warren County Superior Court. Heard in the Court of Appeals 18 September 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Kristin J. Uicker, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez and Nicholas C. Woomer-Deters, for the Defendant.*

DILLON, Judge.

Defendant Kelvin Alphonso Alexander appeals an order denying his post-conviction motion to test DNA evidence and fingerprints in relation to a murder he pleaded guilty to almost three decades ago in 1993.

### I. Background

Early one morning in September 1992, two men robbed a gas station in Norlina. During the robbery, one of the men shot and killed the gas station attendant. A witness told police that she saw the two men fleeing the scene and that one of the men was Defendant, someone she had been acquainted with most of her life.

In October 1992, Defendant was indicted for first-degree murder and armed robbery in connection with the incident. Defendant pleaded guilty to second-degree murder, and the State dismissed the robbery charge as part of a plea deal.

In March 2016, Defendant filed a motion to test the DNA and fingerprints on the shell casings/projectile found at the gas station after the killing. He alleged in his motion that in 2004 an informant who was pleading guilty to an unrelated federal crime told authorities that a Mr. Terry had admitted to him to the 1992 Norlina murder/robbery shortly after it had occurred. Further, Defendant alleged that the informant helped Mr. Terry retrieve the murder weapon from some woods near the gas station. However, the record reflects that Mr. Terry testified at a hearing that he was not involved in the incident, that he never confessed to the informant or anyone else to the Norlina murder/robbery, and that he did not even know Defendant.

The trial court denied Defendant's motion for post-conviction, DNA testing. Defendant appealed.



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## II. Analysis

There are essentially two issues before us. First, may a defendant who has pleaded guilty seek post-conviction DNA testing under N.C. Gen. Stat. § 15A-269 (2015)? Second, if so, has Defendant here met his burden of showing that the results of such testing would be material to his defense?

## A. Availability of Post-Conviction Testing Following a Guilty Plea

[1] The State argues that, even if the results of any testing would prove material to show Defendant's innocence, Defendant is not entitled to seek testing under Section 15A-269 because he pleaded guilty to the murder. Indeed, the Section states that a defendant must show that testing would be "material to the defendant's *defense*," N.C. Gen. Stat. § 15A-269(a)(1) (emphasis added), and that testing is warranted only if "there exists a reasonable probability that *the verdict* would have been more favorable to the defendant" had the requested DNA been tested earlier. N.C. Gen. Stat. § 15A-269(b)(2) (emphasis added). The State argues in its brief that "[t]he plain meaning of 'defense' and 'verdict' [in Section 15A-269] presupposes the existence of a trial and a determination of guilt based on evidence presented to the fact finder," and that a defendant who pleads guilty has put up no defense and results in a conviction without a verdict.

Based on controlling precedent, we conclude that Defendant is not disqualified from seeking post-conviction DNA testing merely for having pleaded guilty. Specifically, in June 2018, our Court held that a defendant was not automatically barred from seeking post-conviction DNA testing merely because he entered a plea of guilty. *State v. Randall*, 259 N.C. App. 885, 887, 817 S.E.2d 219, 221 (2018). In reaching this conclusion, the *Randall* panel relied on language from an opinion by our Supreme Court that " '[i]f the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant.' " *Id.* at 887, 817 S.E.2d at 220 (quoting *State v. Lane*, 370 N.C. 508, 518, 809 S.E.2d 568, 575 (2018)). The *Randall* panel then reasoned that there may be rare situations where there is a reasonable probability that a defendant would not have pleaded guilty in the first instance and would have not otherwise been convicted had he had the results of DNA testing when faced with the charges. *See id.* at 887, 817 S.E.2d at 221.

For example, suppose that an innocent person is charged with a murder based on the statements of several (mistaken) eyewitnesses. It may be that this innocent defendant will plead guilty to second-degree

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murder rather than risk being found guilty of first-degree murder and sentenced to death. However, suppose further that certain DNA found at the scene conclusively belonged to the actual killer. In that situation, there is a reasonable probability that the outcome would have been different had the results of DNA testing been available to the innocent defendant before he decided to plead guilty. There is a reasonable probability that he would have pleaded not guilty and that the DNA would point to someone who merely looked like him, leading to his acquittal or to the charges being dropped.

We recognize the argument that the word “verdict” appearing in Section 15A-269 suggests that our General Assembly intended for post-conviction, DNA testing to be available *only where* there has been an actual *verdict* rendered. And there is no verdict in a matter where a defendant has pleaded guilty. But there is a strong counter-argument that the General Assembly did not intend for the word “verdict” to be construed in such a strict, legal sense. Rather, the General Assembly intended for “verdict” to be construed more broadly, to mean “resolution,” “judgment” or “outcome” in a particular matter. To read “verdict” in a strict, legal sense would lead to an absurd result, clearly not intended by the General Assembly. That is, any defendant who pleads “not guilty” but convicted by a *judge* after a *bench* trial would not be eligible to seek post-conviction DNA testing if a strict interpretation of “verdict” is applied: only *juries* (and not judges) render verdicts in a strict, legal sense.<sup>1</sup>

We note that a few months after our Court decided *Randall*, our Supreme Court in September 2018 affirmed, *per curiam* without any explanation, an unpublished opinion of our Court in which we suggested that post-conviction DNA testing was *not* available to defendants

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1. Our Supreme Court has defined “verdict” as “the unanimous decision made *by the jury* and reported to the court.” *State v. Hemphill*, 273 N.C. 388, 389, 160 S.E.2d 53, 55 (1968) (emphasis added). Our Rules of Civil Procedure describe the decisions of juries as “verdicts,” *see* N.C. Gen. Stat. § 1A-1, Rule 49 (2015), and decisions by judges in bench trials as “findings” by the court. *See* N.C. Gen. Stat. § 1A-1, Rule 52. Black’s Law Dictionary recognizes that the technical definition of “verdict” is a decision rendered by a jury, and not a judge:

The formal and unanimous decision or finding of a jury . . . . The word “verdict” has a well-defined signification in law. It is the decision of the jury, and it never means the decision of a court or a referee or a commissioner [though] in common language, the word “verdict” is sometimes used in a more extended sense, but in law it is always used to mean the decision of a jury.

*Verdict*, Black’s Law Dictionary (7th ed. 1999).

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who had pleaded guilty. *State v. Sayre*, 255 N.C. App. 215, 803 S.E.2d 699, 2017 N.C. App. LEXIS 696 (2017) (unpublished), *aff'd per curiam*, 371 N.C. 468, 818 S.E.2d 101 (2018).

Specifically, in that case, we held that a defendant was not entitled to post-conviction DNA testing because (1) the defendant failed to show how testing would be material to show that he was not the perpetrator and (2) “by entering into a plea agreement with the State and pleading guilty, defendant presented no ‘defense’ pursuant to N.C. Gen. Stat. § 15A-269(a)(1).” *Id.* at \*5. However, only the first issue was before the Supreme Court on appeal, as that issue was the only basis for the dissent from our Court, and the defendant did not seek review of the second issue. *See id.* at \*6 (Murphy, J., dissenting); *see also* N.C. R. App. P. 16(b); *see also Clifford v. River Bend Plantation, Inc.*, 312 N.C. 460, 463, 323 S.E.2d 23, 25 (1984) (“When an appeal is taken pursuant to [N.C. Gen. Stat. § 7A-30(2)], the only issues properly before the Court are those on which the dissenting judge in the Court of Appeals based his dissent.”). Therefore, the Supreme Court’s *per curiam* affirmance was only on this first issue, that the defendant failed to show that testing would be material in that case.

## B. Materiality

**[2]** Section 15A-269 permits a defendant to obtain post-conviction DNA testing if he meets his burden of showing that the results of such testing, among other things, would be “material” to his defense. N.C. Gen. Stat. § 15A-269.

Our Supreme Court has held that “[a] trial court’s determination of whether defendant’s request for postconviction DNA testing is ‘material’ to his defense, as defined in N.C.G.S. § 15A-269(b)(2), is a conclusion of law, and thus we review *de novo* the trial court’s conclusion that defendant failed to show the materiality of his request.” *State v. Lane*, 370 N.C. 508, 517-18, 809 S.E.2d 568, 574 (2018).

Further, whether evidence is “material” to a defendant’s defense is determined by whether “there exists a reasonable probability that the verdict would have been more favorable to the defendant.” *Id.* at 519, 809 S.E.2d at 575. It is the defendant’s burden, though, to show such materiality is present. *Id.* at 518, 809 S.E.2d at 574.

Here, Defendant contends that the requested DNA and fingerprint testing is material because the evidence “would exculpate [Defendant] by corroborating [the informant’s] testimony” about Mr. Terry’s involvement in the murder/robbery. We note, however, there was substantial

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evidence of Defendant's guilt, including (1) the eyewitness who saw Defendant fleeing the scene; (2) Defendant's admission that he was at the scene during the investigation of the crime; and (3) Defendant's admission, through his guilty plea, that he, in fact, committed the crime.

We conclude that Defendant has failed to show how it is reasonably probable that he would not been convicted of at least second-degree murder based on the results of the DNA and fingerprint testing. That is, the presence of another's DNA or fingerprints on this or other evidence would not necessarily exclude Defendant's involvement in the crime. The presence of another's DNA or fingerprints could be explained by the possibility that someone else handled the casings/projectile prior to the crime or that the DNA or fingerprints are from Defendant's accomplice, as there were two involved in the murder. Our jurisprudence sets a high bar to establish materiality in such cases, especially for those who have pleaded guilty. *See State v. Tilghman*, \_\_ N.C. App. \_\_, \_\_, 821 S.E.2d 253, 256 (2018) (stating that "a guilty plea increases a defendant's burden to show materiality"). Thus, we conclude that Defendant has failed to meet his burden of showing materiality.<sup>2</sup>

### III. Conclusion

Defendant has failed to demonstrate that the evidence he seeks to have tested is material to his defense. As such, we affirm the trial court's denial of his motion.

**AFFIRMED.**

Judge BROOK concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur only in the result reached by the majority. I write separately because a defendant who pleads guilty is not entitled to post-conviction DNA testing. *See State v. Sayre*, No. COA17-68, 2017 WL 3480951 (N.C. Ct. App. Aug. 15, 2017), *aff'd per curiam*, 371 N.C. 468, 818 S.E.2d 101 (2018).

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2. We note the State's argument that the issue regarding the testing of the fingerprints is not before us on appeal, contending that the trial court only ruled on the DNA evidence, and not the fingerprint evidence. However, the record shows that in his motion, Defendant sought testing for both and that in its order, the trial court denied Defendant's motion, without any limiting language.

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On November 16, 1993, Defendant pleaded guilty to second degree murder. Defendant signed a standard Transcript of Plea, in which he acknowledged that he was “in fact guilty” of murdering Carl Eugene Boyd. Following a colloquy with the trial court, Defendant’s plea was accepted upon findings that there was a factual basis for Defendant’s plea of guilty and that the plea was entered freely, voluntarily, and understandingly by Defendant.

A defendant may make a motion for post-conviction DNA testing if the biological evidence

- (1) Is material to the defendant’s defense.
- (2) Is related to the investigation or prosecution that resulted in the judgment.
- (3) Meets either of the following conditions:
  - a. It was not DNA tested previously.
  - b. It was tested previously, but the requested DNA test would provide results that are significantly more accurate and probative of the identity of the perpetrator or accomplice or have a reasonable probability of contradicting prior test results.

N.C. Gen. Stat. § 15A-269(a) (2019). A trial court shall grant a defendant’s motion for post-conviction DNA testing if

- (1) The conditions set forth in subdivisions (1), (2), and (3) of subsection (a) of this section have been met;
- (2) If the DNA testing being requested had been conducted on the evidence, there exists a reasonable probability that the verdict would have been more favorable to the defendant; and
- (3) The defendant has signed a sworn affidavit of innocence.

N.C. Gen. Stat. § 15A-269(b).

A defendant who has pleaded guilty cannot establish that post-conviction DNA testing would be material to his defense as required by N.C. Gen. Stat. § 15A-269(a)(1). This Court has previously determined that “by entering into a plea agreement with the State and pleading guilty, defendant presented no ‘defense’ pursuant to N.C. Gen. Stat. § 15A-269(a)(1).” *Sayre*, 2017 WL 3480951, at \*2.

The majority contends that our Supreme Court affirmed only that portion of *Sayre* addressing appointment of counsel. According to the

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majority, the affirmance by our Supreme Court did not address the issue of guilty pleas under Section 15A-269, and, therefore, is not binding on this Court.

It is correct that review by our Supreme Court is generally limited to the issue or issues “specifically set out in the dissenting opinion as the basis for that dissent.” N.C. R. App. 16(b) (2019). In *Sayre*, Judge Murphy states that he dissents from the majority opinion because the defendant’s allegations of materiality under Section 15A-269 entitled him to appointment of counsel. However, Judge Murphy’s dissent correctly addresses the materiality standard under subsection (a)(1). The dissent discusses *State v. Cox*, 245 N.C. App. 307, 781 S.E.2d 865 (2016), in which the defendant argued the trial court erred in denying him counsel pursuant to Section 15A-269(c).

The defendant in *Cox* sought post-conviction DNA testing following his plea of guilty to statutory rape. This Court held that a showing of materiality under subsection (a)(1) was “a condition precedent to the trial court’s authority to grant his motion and appoint him counsel.” *Cox*, at 312, 781 S.E.2d at 868.

Further, this Court has stated,

[W]e reject [d]efendant’s contention that the threshold materiality requirement for the appointment of counsel for purposes of N.C. Gen. Stat. § 15A-269(c) is less demanding than that required for actually ordering DNA testing pursuant to N.C. Gen. Stat. § 15A-269(a)(1) and hold that, in order to support the appointment of counsel pursuant to N.C. Gen. Stat. § 15A-269(c), a convicted criminal defendant must make an allegation addressing the materiality issue that would, if accepted, satisfy N.C. Gen. Stat. § 15A-269(a)(1).

*State v. Gardner*, 227 N.C. App. 364, 368, 742 S.E.2d 352, 355 (2013) (citation and quotation marks omitted).

Even though Judge Murphy indicated he was dissenting on the issue of appointment of counsel, his reasoning and the law on materiality under subsection (a)(1) are so intertwined that the *per curiam* opinion from our Supreme Court in *Sayre* can only be read as affirming the entire majority opinion from this Court.<sup>1</sup> See *Tinajero v. Balfour Beatty*

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1. This case illustrates at least one of the reasons why *per curiam* decisions can be problematic. Judges and practitioners benefit from certainty and clearly developed jurisprudence. The issue in this case could have been settled with a full opinion from our

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*Infrastructure, Inc.*, 233 N.C. App. 748, 761, 758 S.E.2d 169, 177-78 (2014) (citation and quotation marks omitted) (“*Per curiam* decisions stand upon the same footing as those in which fuller citations of authorities are made and more extended opinions are written.”).

Our Supreme Court has stated that a defendant’s plea of guilty is a “formal confession[] of guilt.” *State v. Caldwell*, 269 N.C. 521, 524, 153 S.E.2d 34, 36 (1967). *See also State v. Elliott*, 269 N.C. 683, 685, 153 S.E.2d 330, 332 (1967) (“Defendant’s plea of guilty in open court is [a] confession[.]”). Further,

“[a] valid guilty plea . . . serves as an admission of all the facts alleged in the indictment or other criminal process.” *State v. Thompson*, 314 N.C. 618, 623-24, 336 S.E.2d 78, 81 (1985) (citations omitted). A guilty plea is “[a]n express confession” by a defendant who “directly, and in the face of the court, admits the truth of the accusation.” *State v. Branner*, 149 N.C. 559, 561, 63 S.E. 169, 170 (1908).

*State v. Chandler*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 827 S.E.2d 113, 116 (2019). In addition, it is well settled that a plea of guilty “leaves open for review only the sufficiency of the indictment and waives all defenses other than that the indictment charges no offense.” *State v. Smith*, 279 N.C. 505, 506, 183 S.E.2d 649, 650 (1971) (citation and quotation marks omitted).

Defendant here did not enter an *Alford* plea. Therefore, his plea of guilty served as a confession to the murder of Carl Eugene Boyd and an admission to the truthfulness of all of the facts surrounding his involvement. Accordingly, Defendant waived all defenses available to him, and he cannot show materiality under Section 15A-269(a)(1).

The majority relies on *State v. Randall*, 259 N.C. App. 885, 817 S.E.2d 219 (2018) in determining that a defendant who pleads guilty may seek post-conviction DNA testing pursuant to N.C. Gen. Stat. § 15A-269. However, as set forth above, *Sayre* should be viewed as controlling in this case. “The Court of Appeals has no authority to overrule decisions of the Supreme Court and has the responsibility to follow those decisions until otherwise ordered by the Supreme Court,” thus this Court’s decision should be controlled by *Sayre*. *Dunn v. Pate*, 334 N.C. 115, 118, 431 S.E.2d 178, 180 (1993) (*purgandum*).

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Supreme Court in *Sayre*. However, our case law has developed around *Randall*. Courts have likely invested unnecessary time, energy, and resources handling motions for post-conviction DNA testing where defendants entered guilty pleas.



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In addition, the majority misses the mark on its discussion of the term “verdict” in N.C. Gen. Stat. § 15A-269(b). The majority defines “verdict” and even quotes case law from our Supreme Court telling us what that term means. But, the majority, without any citation or attribution, simply declares that “the General Assembly intended for ‘verdict’ to be construed more broadly, to mean ‘resolution,’ ‘judgment,’ or ‘outcome’ in a particular matter.”

“When the language of a statute is plain and free from ambiguity, expressing a single, definite and sensible meaning, that meaning is conclusively presumed to be the meaning which the Legislature intended, and the statute must be interpreted accordingly.” *Dep’t of Transp. v. Adams Outdoor Advert. of Charlotte Ltd. P’ship*, 370 N.C. 101, 107, 804 S.E.2d 486, 492 (2017) (citation and quotation marks omitted). Legislative intent “may be found first from the plain language of the statute . . . . If the language of a statute is clear, the court must implement the statute according to the plain meaning of its terms so long as it is reasonable to do so.” *Midrex Techs., Inc. v. N.C. Dep’t of Revenue*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016) (citation and quotation marks omitted). “The intent of the legislature . . . is to be found not in what the legislature meant to say, but in the meaning of what it did say.” *Burnham v. Adm’r, Unemployment Comp. Act*, 184 Conn. 317, 325, 439 A.2d 1008, 1012 (1981).

The majority finds no ambiguity in the term “verdict;” it simply laments the plain meaning of the statute.

If the plain language of Section 15A-269 is not clear enough, the General Assembly has established what a verdict is. N.C. Gen. Stat. § 15A-1237, titled “Verdict,” states that:

- (a) The verdict must be in writing, signed by the foreman, and made a part of the record of the case.
- (b) The verdict must be unanimous, and must be returned by the jury in open court.
- (c) If the jurors find the defendant not guilty on the ground that he was insane at the time of the commission of the offense charged, their verdict must so state.
- (d) If there are two or more defendants, the jury must return a separate verdict with respect to each defendant. If the jury agrees upon a verdict for one defendant but not another, it must return that verdict upon which it agrees.
- (e) If there are two or more offenses for which the jury could return a verdict, it may return a verdict with respect



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to any offense, including a lesser included offense on which the judge charged, as to which it agrees.

N.C. Gen. Stat. § 15A-1237 (2019).

Accordingly, for there to be “a reasonable probability that the *verdict* would have been more favorable to the defendant,” under Section 15A-269, there must have been a verdict returned by a jury. N.C. Gen. Stat. § 15A-269(b)(2) (emphasis added). Use of the term “verdict” obviously has a “single, definite and sensible meaning.” *Adams Outdoor Advert. of Charlotte Ltd. P’ship*, 370 N.C. at 107, 804 S.E.2d at 492. The majority should be faithful to the plain language of the statute, and not rewrite it with its own definition.

Also, the requirement of an affidavit of innocence in Section 15A-269(b)(3) is inconsistent with a defendant’s plea of guilty. Defendants provide sworn answers to the questions on their transcript of plea. A defendant who, under oath, admits guilt to a charged offense, cannot thereafter provide a truthful affidavit of innocence. Allowing sham affidavits makes a mockery of the procedure established by the General Assembly.

Defendant here swore under oath that he was in fact guilty of murdering and robbing Carl Eugene Boyd in September 1992. Twenty-three years later he signed a document and swore that he was innocent. It cannot be both. This demonstrates just another reason why a defendant cannot plead guilty and later be entitled to post-conviction DNA testing pursuant to the plain language of N.C. Gen. Stat. § 15A-269.

**STATE v. CHADWICK**

[271 N.C. App. 88 (2020)]

STATE OF NORTH CAROLINA

v.

MARCUS DOMINIQUE CHADWICK

No. COA19-271

Filed 21 April 2020

**Probation and Parole—special conditions of probation—drug assessment and treatment—discretionary authority**

After convictions for multiple illegal drug offenses, a special condition of probation requiring defendant to undergo a drug assessment and comply with any treatment recommendations was within the trial court's discretionary authority under N.C.G.S. § 15A-1343(b1)(10) since the requirement bore a reasonable relationship to defendant's crimes and tended to reduce his exposure to crime and assist in his rehabilitation.

Appeal by defendant from judgments entered 7 November 2018 by Judge Joshua W. Willey Jr. in Onslow County Superior Court. Heard in the Court of Appeals 14 November 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Christopher R. McLennan, for the State.*

*Edward Eldred for defendant.*

DIETZ, Judge.

Defendant Marcus Chadwick was convicted of multiple offenses, including offenses related to illegal drug use. As a condition of Chadwick's supervised probation, the trial court ordered him to undergo an assessment by a drug treatment program and to comply with any treatment recommendations from that program.

Chadwick challenges this probation condition on appeal. As explained below, that special condition was reasonably related to Chadwick's rehabilitation and thus well within the trial court's sound discretion. We therefore affirm the trial court's judgments.

**Facts and Procedural History**

On 16 September 2016, a police officer arrived at Defendant Marcus Chadwick's home to arrest him for failure to appear in court. As Chadwick went inside to get his shoes, the officer smelled a strong

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odor of marijuana and noticed a measuring scale and a shotgun in Chadwick's bedroom. The officer tried to detain Chadwick, but Chadwick fled. Law enforcement ultimately arrested Chadwick and found 62 grams of marijuana, digital scales, and other drug paraphernalia in his possession.

Chadwick was found guilty of felony possession of marijuana, misdemeanor possession of drug paraphernalia, felony assault on a law enforcement officer inflicting physical injury, and misdemeanor resisting a public officer. At sentencing, the trial court consolidated Chadwick's felony convictions and the drug paraphernalia conviction into one judgment and imposed a sentence of five to fifteen months in prison. The court suspended that sentence and placed Chadwick on supervised probation for thirty months.

The court also imposed a special probation condition because of the evidence of Chadwick's drug use. The court ordered Chadwick to "[r]eport for initial evaluation by TASC up to and includ[ing] inpatient treatment[,] participate in all further evaluation, counseling, treatment, or education programs recommended as a result of that evaluation, and comply with all other therapeutic requirements of those programs until discharged." "TASC" is an acronym for "Treatment Accountability for Safer Communities," a drug treatment network that specializes in services for people involved in the justice system and suffering from substance abuse.

Chadwick appealed, challenging this special condition of his supervised probation.

**Analysis**

Chadwick argues that the trial court lacked authority to order him to be evaluated by the drug treatment program and then to comply with any treatment recommendations from the program. "A challenge to a trial court's decision to impose a condition of probation is reviewed on appeal using an abuse of discretion standard." *State v. Allah*, 231 N.C. App. 88, 98, 750 S.E.2d 903, 911 (2013). Under this standard, we can reverse only if "the trial court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Id.*

In addition to the regular conditions of probation, the trial court may require a probationer to comply with one or more "special conditions" described by statute. N.C. Gen. Stat. § 15A-1343(b1). Some of these special conditions require probationers to participate in medical,

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psychiatric, or substance abuse treatment. *See, e.g.*, N.C. Gen. Stat. § 15A-1343(b1)(1)–(2b). Chadwick argues that, under these provisions, only the trial court can require a probationer to undertake a specific drug treatment action. Thus, he reasons, the trial court improperly delegated its authority by ordering that Chadwick undergo a drug treatment *evaluation* (not a specific course of drug treatment) and then ordering Chadwick to comply with whatever course of treatment the *program* (not the trial court) determined to be appropriate after that evaluation.

We need not decide whether Chadwick’s statutory analysis is correct because this condition of probation is permissible under a separate section of the statute. In addition to the enumerated special conditions, the statute permits the trial court to require a probationer to “[s]atisfy any other conditions determined by the court to be reasonably related to his rehabilitation.” N.C. Gen. Stat. § 15A-1343(b1)(10).

Trial courts have wide discretion to formulate conditions under this provision. *State v. Harrington*, 78 N.C. App. 39, 48, 336 S.E.2d 852, 857 (1985). The extent to which a condition of probation may be imposed under this provision “hinges upon whether the challenged condition bears a reasonable relationship to the offenses committed by the defendant, whether the condition tends to reduce the defendant’s exposure to crime, and whether the condition assists in the defendant’s rehabilitation.” *Allah*, 231 N.C. App. at 98, 750 S.E.2d at 911.

Here, Chadwick was convicted of several crimes that suggest he suffers from substance abuse issues. A special probation condition requiring Chadwick to submit to evaluation through a drug treatment program, and to comply with any treatment recommendations stemming from that evaluation, bears a reasonable relationship to Chadwick’s drug-related crimes and is reasonably likely to reduce Chadwick’s exposure to drug crimes and assist in his rehabilitation. Accordingly, the trial court’s decision to impose this condition was well within the trial court’s sound discretion.

**Conclusion**

We affirm the trial court’s judgments.

**AFFIRMED.**

Judges DILLON and ARROWOOD concur.

**STATE v. COLEMAN**

[271 N.C. App. 91 (2020)]

STATE OF NORTH CAROLINA

v.

MICHAEL JIMMY COLEMAN

No. COA19-844

Filed 21 April 2020

**1. Appeal and Error—lack of notice of appeal in record—jurisdiction—petition for writ of certiorari—motion to amend record**

Where the record on appeal did not include a notice of appeal giving the Court of Appeals jurisdiction, the court, in its discretion, granted defendant's petition for writ of certiorari and granted his motion to amend the record to reflect his notice of appeal.

**2. Drugs—trafficking—jury instructions—lesser-included charge of selling a controlled substance—total weight of tablets—plain error analysis**

Where defendant was charged with trafficking opium pursuant to N.C.G.S. § 90-95(h)(4) (which requires at least 4 grams), and the evidence showed defendant sold hydrocodone tablets with a total weight of 8.47 grams, the trial court did not commit plain error by failing to ex mero motu instruct the jury on the lesser-included charge of selling opium even though the State's witness testified she purchased twenty 10-milligram tablets of hydrocodone from defendant. There was no conflict in the evidence regarding the weight of the hydrocodone tablets because 10 milligrams referred to the amount of the active ingredient, not the total weight of the tablets. Under section 90-95(h)(4), the total weight of tablets, pills, and other mixtures—not just the weight of their active ingredient—determines whether the amount possessed constitutes trafficking.

Appeal by defendant from judgment entered 22 April 2019 by Judge Carla Archie in Cleveland County Superior Court. Heard in the Court of Appeals 1 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.*

*Edward Eldred for defendant-appellant.*

TYSON, Judge.

**STATE v. COLEMAN**

[271 N.C. App. 91 (2020)]

Michael Jimmy Coleman (“Defendant”) appeals from a judgment entered upon a jury’s verdict finding him guilty of trafficking opium; possession with intent to manufacture, sell, and distribute a schedule-III-controlled substance; and to sell/deliver a schedule-III-controlled substance. We find no error.

**I. Background**

A confidential informant (“CI”) worked with the Cleveland County Sheriff’s Department Narcotics Division Sergeant Travis Hamrick (“Sgt. Hamrick”) to identify and provide names of illicit drug dealers located in Cleveland County from whom she could buy illegal narcotics. The CI informed Sgt. Hamrick that Defendant “was selling pills, hydrocodone and Xanax in particular.”

The CI agreed to participate in a controlled buy of narcotics from Defendant on 1 February 2016. Sgt. Hamrick, along with Narcotics Division, Lieutenant Judy Seagle (“Lt. Seagle”) met the CI in a supermarket’s parking lot in Kings Mountain near Defendant’s home.

Sgt. Hamrick and Lt. Seagle confirmed the CI did not have any narcotics on her person or in her vehicle. The CI was wired with a button camera underneath her shirt and given a cell phone to record audio. Sgt. Hamrick gave the CI \$82.00 in U.S. currency to purchase the narcotics.

Sgt. Hamrick and Lt. Seagle followed the CI from the supermarket’s parking lot to Defendant’s home. The detectives parked at a neighboring home, while the CI went to Defendant’s home. Once the CI was inside of Defendant’s home, she told Defendant she needed to buy pills for her brother, who she claimed was waiting back at the nearby parking lot. Defendant sold the CI six Xanax tablets and five oxycodone tablets for \$80.00.

After the CI left Defendant’s home, the detectives followed her back to the same parking lot. The CI gave the six Xanax tablets, five oxycodone tablets, and \$2.00 in change to the detectives. Sgt. Hamrick and Lt. Seagle again searched the CI’s person and vehicle to “make sure that she didn’t keep anything.” Laboratory testing later confirmed the tablets contained alprazolam (Xanax), a schedule-IV-controlled substance, and dihydrocodeinone, which is hydrocodone, a schedule-III-controlled substance.

The CI conducted two further buys from Defendant at his home. On 4 February 2016, the CI bought twenty hydrocodone tablets for \$200.00. Laboratory tests confirmed the tablets contained hydrocodone and had a total weight of 8.47 grams. On 5 February 2016, the CI purchased an

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additional twenty hydrocodone tablets for \$160.00. Laboratory testing confirmed the tablets contained hydrocodone and weighed 8.46 grams.

The State presented the testimony of Deborah Chancey, an analyst at the North Carolina State Crime Laboratory. Analyst Chancey selected and analyzed one tablet that contained dihydrocodeinone or hydrocodone. This tablet weighed “.42 grams, and the net weight of the remaining tablets was 8.05 grams plus or minus 0.03 grams.”

Sgt. Hamrick and Lt. Seagle visited Defendant at his home on 24 February 2016 to discuss his potential cooperation with the Narcotics Division in their investigation of his narcotics supplier. During this visit, Defendant allowed the officers to search his home. Lt. Seagle located a pill bottle with Defendant’s sister’s name thereon, which contained a “mixture of pills.” Sgt. Hamrick visually inspected the pills and found “[s]ome of the pills that were in the bottle were consistent with what [Defendant] had sold” to the CI in the controlled purchases.

Defendant was indicted for possession with intent to manufacture, sell, deliver hydrocodone; selling and delivering hydrocodone, possession with intent to manufacture, sell, deliver alprazolam; and selling and delivering alprazolam for the 1 February 2016 transactions. Defendant was indicted for two counts of trafficking opium for the transactions on 4 February and 5 February 2016.

On 16 April 2019, the jury returned verdicts and convicted Defendant of all charges, except the trafficking in opium indictment for the 5 February 2016 transaction. Defendant was acquitted of that charge.

The trial court consolidated the convictions and sentenced Defendant to an active term of 70 to 93 months of imprisonment on 22 April 2019. The trial court prepared appellate entries on that same date.

## II. Jurisdiction

[1] The record on appeal does not include any reference to Defendant entering an oral or written notice of appeal. The trial court’s appellate entries are included. On 30 December 2019, Defendant petitioned this Court to issue a writ of certiorari to hear his belated appeal. Defendant also filed a motion to amend the record on appeal to offer proof of his written notice of appeal.

A writ of certiorari may be issued “when the right to prosecute an appeal has been lost by failure to take timely action.” N.C. R. App. P. 21(a)(1). “*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown.” *State v. Grundler*, 251 N.C. 177, 189, 111

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S.E.2d 1, 9 (1959) (citation omitted) (alteration original), *cert denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960).

In an exercise of discretion, this Court grants Defendant’s petition for writ of certiorari to hear his belated appeal. This Court possesses jurisdiction pursuant to N.C. Gen. Stat. § 15A-1444(g) (2019); N.C. R. App. P. 21(a)(1) (“The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]”).

Our Supreme Court has held whether to grant or deny a motion to amend the record is “a decision within the discretion of the Court of Appeals” which constitutes a legitimate application of our appellate rules absent an “abuse of discretion.” *State v. Petersilie*, 334 N.C. 169, 177, 432 S.E.2d 832, 837 (1993). The State argues the purported document is not an appropriate entry or statement showing an appeal taken orally. In support of this assertion, the State cites *State v. Hughes*, wherein this Court dismissed an appeal because the appealing party failed to comply with Rule 4 of our Rules of Appellate Procedure. This failure deprived this Court of jurisdiction to consider the appeal. *State v. Hughes*, 210 N.C. App. 482, 485, 707 S.E.2d 777, 778-79 (2011). However, the reasoning in *Hughes* is distinguishable from the facts of this case. In *Hughes*, the defendant did not petition this court for a writ of certiorari or to amend the record. *Id.* Contemporaneously filed with this motion to amend was Defendant’s now-allowed petition for writ of certiorari. Having acquired jurisdiction, and in the exercise of our discretion, this Court allows Defendant’s motion to amend the record to reflect his notice of appeal.

### III. Issue

Defendant argues the trial court committed plain error by not instructing the jury *ex mero motu* on the lesser-included offense of selling hydrocodone. Defendant acknowledges he did not request the lesser-included offense and review of this argument is limited to plain error.

### IV. Lesser-Included Instruction

#### A. Standard of Review

Under our Rules of Appellate Procedure: “In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action



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questioned is specifically and distinctly contended to amount to plain error.” N.C. R. App. P. 10(a)(4).

This Court’s review under plain error is “applied cautiously and only in the exceptional case” where the error “seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings” to overcome dismissal for a defendant’s failure to preserve. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). To constitute plain error, Defendant carries and maintains the burden to show “not only that there was error, but that absent the error, the jury probably would have reached a different result” to demonstrate prejudice. *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993).

## B. Analysis

**[2]** Defendant argues the trial court plainly erred by not instructing the jury on the lesser-included offense of selling a controlled substance. Defendant asserts the State’s evidence conflicted on the weight of the hydrocodone the CI had purchased from him during the 4 February 2016 transaction.

Our Supreme Court has held: “Where there is conflicting evidence as to an essential element of the crime charged, the court should instruct the jury with regard to any lesser included offense *supported by any version of the evidence*.” *State v. Jones*, 304 N.C. 323, 331, 283 S.E.2d 483, 488 (1981) (emphasis original).

“[O]nly where there is evidence from which the jury reasonably could find that the defendant committed the lesser offense” is the trial court required to instruct the jury on a lesser included offense. *State v. Bagley*, 321 N.C. 201, 210, 362 S.E.2d 244, 249-50 (1987). “If the State’s evidence is sufficient to fully satisfy its burden of proving each element of the greater offense and there is no evidence to negate those elements other than the defendant’s denial that he committed the offense, [the] defendant is not entitled to an instruction on the lesser offense.” *State v. Smith*, 351 N.C. 251, 267-68, 524 S.E.2d 28, 40 (2000) (citation omitted).

To determine if the lesser-included offense instruction is necessary, the test is “whether the State’s evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.” *State v. Chaves*, 246 N.C. App. 100, 103, 782 S.E.2d 540, 543 (2016) (internal citation and quotation marks omitted).

Our General Statutes provide a defendant is guilty of trafficking in opium or heroin when he “sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound,

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derivative, or preparation of opium or opiate . . . including heroin, or any mixture containing such substance.” N.C. Gen. Stat. § 90-95(h)(4) (2019). “[T]he legislature’s use of the word ‘mixture’ establishes that the total weight of the dosage units . . . is sufficient basis to charge a suspect with trafficking.” *State v. Jones*, 85 N.C. App. 56, 68, 354 S.E.2d 251, 258 (1987). The two essential elements of trafficking in opium are a defendant must (1) knowingly sell (2) a specified amount of opium (or any preparation thereof). *State v. Hunt*, 249 N.C. App. 428, 432, 790 S.E.2d 874, 878 (2016).

Our Supreme Court has held “tablets and pills of prescription pharmaceutical drugs” are mixtures under N.C. Gen. Stat. § 90-95(h)(4). *State v. Ellison*, 366 N.C. 439, 444, 738 S.E.2d 161, 163-64 (2013). A defendant’s criminal liability under N.C. Gen. Stat. § 90-95(h)(4) is “based on the total weight of the mixture involved.” *Id.* at 440, 738 S.E.2d at 162. The total weight of the pills or tablets determines whether the amount possessed constitutes trafficking. *See id.*

Analyst Chancey testified the total weight of the twenty tablets from the 4 February purchase weighed 8.47 grams, plus or minus 0.03 grams. Defendant argues the CI’s testimony that she had purchased “\$200 worth of pain pills, 20 of them, 10-milligram hydrocodone” provides sufficient conflicting evidence to require the trial court to issue the lesser-included instruction *ex mero motu*.

This testimony does not create a conflict to warrant the lesser-included instruction. The “10-milligram hydrocodone” merely relates to the dosage or strength of the hydrocodone, the active ingredient in the tablets. Under *Ellison*, the total weight of the pills is considered to determine whether the statutory threshold is met, not just the weight of the active ingredient. *Ellison*, 366 N.C. at 442, 738 S.E.2d at 163-64. The CI was not referencing the total weight. Analyst Chancey’s testimony provided the total weight of the tablets from her laboratory analysis to meet the State’s burden.

The evidence presented at trial tended to show Defendant sold to the CI twenty tablets containing hydrocodone weighing a total of 8.47 grams, satisfying all essential elements of the trafficking in opium charge from the 4 February 2016 incident. We find no error, and certainly no plain error, in the trial court not instructing the jury *ex mero motu* on the lesser-included offense of selling a controlled substance. Defendant’s argument for plain error review is overruled.

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**V. Conclusion**

Defendant's argument that the trial court committed any error, including plain error, by not instructing the jury *ex mero motu* on the lesser-included offense of selling a controlled substance is without merit. Defendant received a fair trial, free from prejudicial errors he preserved or argued. We find no error in the jury's verdicts or in the judgment entered upon. *It is so ordered.*

NO ERROR.

Judges ZACHARY and BROOK concur.

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STATE OF NORTH CAROLINA

v.

ROGELIO ALBINO DIAZ-TOMAS, DEFENDANT

No. COA19-777

Filed 21 April 2020

**1. Appeal and Error—petition for a writ of mandamus—not a substitute for appeal—motion to take judicial notice—failure to make argument**

Where the State dismissed (with leave) charges against defendant for driving while impaired and without an operator's license and the district court denied defendant's motion to reinstate the charges, the Court of Appeals denied defendant's two petitions for a writ of mandamus compelling the district court to reverse its decision because the proper means to review that decision would have been to file an appeal or petition for certiorari with the superior court. The Court of Appeals also denied defendant's motion to take judicial notice of local judicial rules because defendant made no argument explaining why it should do so.

**2. Courts—superior court—denial of petition for certiorari—discretionary decision**

Where the State dismissed (with leave) charges against defendant for driving while impaired and without an operator's license and the district court denied defendant's motion to reinstate the charges, the superior court did not abuse its discretion by denying defendant's petition for certiorari seeking review of the district

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court's ruling. Defendant failed to show that the superior court's decision was arbitrary or manifestly unsupported by reason, and his argument that the superior court was obligated to grant certiorari lacked merit because such decisions are discretionary in nature.

**3. Appeal and Error—petition for certiorari—granted as to one court decision—review unavailable for other court decision—moot argument**

Where the State dismissed (with leave) charges against defendant for driving while impaired and without an operator's license, the district court denied defendant's motion to reinstate the charges, and the superior court denied defendant's petition for certiorari seeking review of the district court's ruling, the Court of Appeals dismissed defendant's argument challenging the district court's ruling where it had only granted certiorari to review the superior court's ruling. Moreover, defendant's arguments regarding the district court's ruling became moot where the Court of Appeals had already affirmed the superior court's ruling.

Judge ZACHARY concurring in part and dissenting in part.

Appeal by defendant from order entered 24 July 2019 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Law Offices of Anton M. Lebedev, by Anton M. Lebedev, for defendant-appellant.*

YOUNG, Judge.

Where defendant failed to demonstrate that the Superior Court abused its discretion in denying his petition for certiorari, we affirm that decision. Where the District Court's denial of defendant's motion to reinstate charges is not properly before us, we dismiss such argument. Where mandamus is not an appropriate remedy, we deny defendant's petitions for writ of mandamus. Where defendant requests that we take judicial notice of local rules, but declines to show for what purpose we must do so, we deny defendant's motion to take judicial notice. We affirm in part and dismiss in part.

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**I. Factual and Procedural Background**

On 5 April 2015, Rogelio Albino Diaz-Tomas (defendant) was cited for driving while impaired and without an operator's license. Defendant was told to appear in Wake County District Court for a hearing on the citation. On 25 February 2016, the Wake County District Court issued an order for arrest due to defendant's failure to appear. On 11 July 2016, the State entered a dismissal with leave of the charges.

On 24 July 2018, defendant was arrested and ordered to appear. On 13 November 2018, the court issued another order for defendant's arrest due to his failure to appear. On 12 December 2018, he was again arrested and ordered to appear.

On 28 January 2019, defendant filed a motion in Wake County District Court to reinstate the charges that the State had previously dismissed with leave. Defendant sought a writ of mandamus from the North Carolina Supreme Court, which the Court denied on 26 February 2019. On 15 June 2019, the Wake County District Court denied defendant's motion to reinstate the charges, holding that the State acted within its discretion and statutory authority by entering a dismissal with leave.

On 22 July 2019, defendant filed a petition for writ of certiorari in Wake County Superior Court, seeking review of the District Court's denial of his motion to reinstate the charges. On 24 July 2019, the Superior Court, in its discretion, denied and dismissed defendant's petition for writ of certiorari.

Defendant filed a petition for writ of certiorari to this Court. On 15 August 2019, this Court granted defendant's petition for the purpose of reviewing the order of the Superior Court denying defendant's petition for certiorari filed in that court.

**II. Preliminary Motions**

[1] In addition to his arguments on appeal, defendant has filed two petitions for writ of mandamus and one motion to take judicial notice. For the following reasons, we deny all three.

With respect to his petitions for writ of mandamus, defendant seeks a writ compelling the District Court to grant his motion to reinstate the charges. In essence, he seeks to attack the District Court's denial of his motion collaterally, rather than on appeal, by requesting that we compel the District Court to reverse itself.

However, “[a]n action for *mandamus* may not be used as a substitute for an appeal.” *Snow v. N.C. Bd. of Architecture*, 273 N.C. 559, 570, 160

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S.E.2d 719, 727 (1968). Our Supreme Court has held that “*mandamus* is not a proper instrument to review or reverse an administrative board which has taken final action on a matter within its jurisdiction.” *Warren v. Maxwell*, 223 N.C. 604, 608, 27 S.E.2d 721, 724 (1943). Rather, if statute provides no right of appeal, “the proper method of review is by *certiorari*.” *Id.* As such, defendant’s petitions – seeking to reverse the decision of the District Court – are not properly remedied by mandamus, but by appeal or certiorari, the latter of which defendant in fact pursued in Superior Court.

Moreover, even if mandamus offered an appropriate remedy, this Court would not be the appropriate venue. “Applications for the writ[] of mandamus . . . shall be made by filing a petition therefor with the clerk of the court to which appeal of right might lie from a final judgment entered in the cause[.]” N.C.R. App. P. 22(a). From a final judgment entered in Wake County District Court, appeal of right lies to Wake County Superior Court. *See* N.C. Gen. Stat. § 7A-271(b) (2019). As such, a petition for writ of mandamus would properly have been filed with the Superior Court, not with this Court. For these reasons, we deny defendant’s petitions for writ of mandamus.

With respect to defendant’s motion to take judicial notice, defendant requests that this Court take judicial notice of the Wake County Local Judicial Rules. While defendant is correct that these rules are of a sort of which this Court may properly take judicial notice, defendant offers no reason for us to do so. His argument does not rely upon nor cite to these Rules. Nor need we rely upon them for our reasoning, as shown below. As such, we decline to take judicial notice of the Wake County Local Judicial Rules, and deny this motion as well.

### III. Petition for Certiorari

**[2]** In his second argument on appeal, which we address first, defendant contends that the Superior Court erred in denying his petition for certiorari. We disagree.

#### A. Standard of Review

“The authority of a superior court to grant the writ of certiorari in appropriate cases is . . . analogous to the Court of Appeals’ power to issue a writ of certiorari[.]” *State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33 (1993). “*Certiorari* is a discretionary writ, to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right.” *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579, 140 S.E. 230, 231 (1927). “[I]n our review of the superior court’s grant or denial of certiorari to an inferior tribunal, we

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determine only whether the superior court abused its discretion. We do not address the merits of the petition to the superior court in the instant case.” *N.C. Cent. Univ. v. Taylor*, 122 N.C. App. 609, 612, 471 S.E.2d 115, 117 (1996), *aff’d per curiam*, 345 N.C. 630, 481 S.E.2d 83 (1997).

“Abuse of discretion results where the court’s ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

**B. Analysis**

Defendant, in his brief, concedes that the decision whether to grant certiorari is discretionary. He argues, nonetheless, that “just because *certiorari* is a discretionary writ does not mean that the Superior Court can deny the writ for any reason.”

While defendant is certainly correct in essence – the discretion of a trial court is not blanket authority, and must have some basis in reason – his argument goes too far afield. Defendant proceeds to argue, in essence, that the trial court abused its discretion in denying the writ because he was *entitled* to it. Defendant argues, for example, that he demonstrated “appropriate circumstances” for the issuance of a writ “to review this compelling interlocutory issue[;]” that the court should have allowed the petition due to its potential influence on the outcome of other Wake County cases; and ultimately that the Superior Court apparently had an obligation to grant certiorari.

These arguments must fail. The Superior Court is under no obligation to grant certiorari. While certainly it must have some reason for denying the writ, that does not equate to an affirmative duty to grant it. Even assuming *arguendo* that the District Court’s denial of defendant’s motion to reinstate the charges was erroneous, the Superior Court was not obligated to grant certiorari to review it. The result would be unfortunate, but such is the case with discretionary writs. They are, by nature, discretionary.

On appeal, defendant bears the burden of showing that the decision of the Superior Court in denying his petition for certiorari was “manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. It is not enough that he disagree with it, or argue – incorrectly – that the trial court was obligated to grant his petition. Defendant has to show that the Superior Court’s decision was unsupported by reason or otherwise entirely arbitrary. We hold that he has failed to do so.

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Accordingly, we hold that the trial court did not err in denying defendant's petition for certiorari.

IV. Motion to Reinstate Charges

[3] Defendant also contends on appeal that the District Court erred in denying his motion to reinstate charges. However, as we have held, the Superior Court did not err in denying his petition for certiorari. Additionally, we note that this Court granted certiorari solely for the purpose of reviewing the Superior Court's denial of certiorari, not for the purpose of reviewing the District Court's denial of the motion to reinstate charges. Indeed, on review of an appeal from the superior court's denial of certiorari, "[w]e do not address the merits of the petition[.]" which in the instant case would be whether the District Court erred in denying the motion to reinstate the charges. *N.C. Cent. Univ.*, 122 N.C. App. at 612, 471 S.E.2d at 117. As such, this argument is not properly before us, and is moot. We therefore decline to address it, and dismiss it.

AFFIRMED IN PART, DISMISSED IN PART.

Judge BERGER concurs.

Judge ZACHARY concurs in part and dissents in part by separate opinion.

ZACHARY, Judge, concurring in part, dissenting in part.

I concur with the conclusion reached in Section IV of the majority's opinion regarding Defendant's arguments concerning the district court's "Order Denying Defendant's Motion to Reinstate Charges." As the majority explains, that order is not before this Court. We allowed Defendant's petition for writ of certiorari for the limited purpose of reviewing the superior court's "Order Denying Petition for Writ of Certiorari." *Majority* at 7. Accordingly, we lack jurisdiction over the district court's order, and Defendant's challenge thereto is improper.

As discussed below, I also agree with the majority that mandamus is an improper remedy to redress the errors alleged in this matter, although I reach this result for different reasons than the majority. However, I respectfully dissent from the remainder of the majority's opinion.

First, I would allow Defendant's "Motion to Take Judicial Notice of Current Local Rules." While noting that the Wake County Local Judicial



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Rules are indeed “of a sort of which this Court may properly take judicial notice,” the majority nevertheless denies Defendant’s motion on the grounds that he “offers no reason for us to do so. His argument does not rely upon nor cite to these Rules. Nor need we rely upon them for our reasoning . . . .” *Id.* at 4. I respectfully disagree. Defendant asserts in his motion that “[t]he local rules are inconsistent with the District Court’s actions in this instant case.” Furthermore, it is manifest that in order to conduct a full and thorough appellate review of the superior court’s order—as is our mandate in this appeal, pursuant to our Court’s 15 August 2019 order allowing Defendant’s petition for writ of certiorari—we must necessarily review the allegations of Defendant’s underlying petition.

Moreover, as explained below, I cannot agree with the majority’s analysis regarding the superior court’s denial of Defendant’s petition for writ of certiorari. For these reasons, I respectfully concur in part, and dissent in part, from the majority’s opinion.

*Facts and Procedural History*

On 4 April 2015, Defendant was charged by criminal citation with driving while impaired, in violation of N.C. Gen. Stat. § 20-138.1 (2019), and driving without an operator’s license, in violation of N.C. Gen. Stat. § 20-7(a). After Defendant failed to appear in Wake County District Court on 24 February 2016, the district court issued an order for his arrest. On 11 July 2016, the Wake County District Attorney’s Office dismissed Defendant’s charges with leave, due to his “fail[ure] to appear for a criminal proceeding at which [his] attendance was required and” upon the prosecutor’s belief that he could not “readily be found.” Defendant’s driving privilege was also revoked as a result of his failure to appear.

In July 2018, Defendant was arrested on the February 2016 order for his arrest; but after he again failed to appear for his 9 November 2018 court date, the district court issued another order for his arrest. Defendant was arrested on 12 December 2018, and he was ordered to appear in Wake County District Court at 2:00 p.m. on 18 January 2019. However, Defendant’s case was subsequently scheduled as an “add-on case” during the 14 December 2018 Criminal Administrative Driving While Impaired Session of Wake County District Court. Upon Defendant’s appearance on 14 December 2018, the assistant district attorney declined to reinstate Defendant’s charges.

According to Defendant, his scheduled “18 January 2019 Criminal District Court date never took place.” Accordingly, on 28 January 2019, Defendant filed a “Motion to Reinstate Charges” in Wake County

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District Court, alleging, *inter alia*, that “[t]he State will not reinstate . . . Defendant’s criminal charges unless [he] enters a guilty plea to the DWI charge and waives his right to appeal[.]” On 15 July 2019, the district court entered its Order Denying Defendant’s Motion to Reinstate Charges.

On 22 July 2019, Defendant petitioned the Wake County Superior Court to issue its writ of certiorari, seeking reversal of the district court’s order and reinstatement of Defendant’s criminal charges. The superior court “denied and dismissed” Defendant’s petition for writ of certiorari by order entered 24 July 2019. The superior court determined that Defendant “failed to provide ‘sufficient cause’ to support the granting of his Petition” and “is not entitled to the relief requested[.]”

Defendant subsequently filed a petition for writ of certiorari with this Court. By order entered 15 August 2019, we allowed Defendant’s petition “for purposes of reviewing the order entered by [the superior court] on 24 July 2019.”

*Discussion*

As explained below, I concur in the denial of Defendant’s (1) “Alternative Petition for Writ of Mandamus,” and (2) “Second Alternative Petition for Writ of Mandamus,” directed to the Wake County District Attorney and the Wake County District Court, respectively. However, I respectfully dissent from the majority’s decision regarding the superior court’s denial of Defendant’s petition for writ of certiorari.

A. Mandamus

“Mandamus translates literally as ‘We command.’ ” *In re T.H.T.*, 362 N.C. 446, 453, 665 S.E.2d 54, 59 (2008) (citation omitted). A writ of mandamus is, thus, an “extraordinary” court order issued “to a board, corporation, inferior court, officer or person commanding the performance of a specified official duty imposed by law.” *Id.* (citation and quotation marks omitted). Courts of the appellate division—that is, this Court and our Supreme Court—“may issue writs of mandamus ‘to supervise and control the proceedings’ of the” trial courts, but may only do so “to enforce established rights, not to create new rights.” *Id.* (quoting N.C. Gen. Stat. § 7A-32(b), (c) (2007)) (additional citation omitted). A number of requirements must be satisfied before a writ of mandamus may issue, *see id.*, but for our purposes, it is sufficient to note that “the party seeking relief must demonstrate a clear legal right to the act requested”; “the defendant must have a legal duty to perform the act requested”; and “the duty must be clear and not reasonably debatable.” *Id.* at 453-54, 665 S.E.2d at 59 (citation omitted).

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Here, Defendant filed two separate petitions for the writ of mandamus, requesting that this Court (1) “compel the Wake County District Attorney to promptly reinstate or dismiss his charges”; and (2) “compel the Wake County District Court to schedule Defendant a trial or hearing within a reasonable time.” Contrary to the majority’s determination, Defendant’s petitions are properly addressed to this Court, not the superior court. *See In re Redwine*, 312 N.C. 482, 484, 322 S.E.2d 769, 770 (1984) (“The superior court judge misconstrued his authority to issue the writ of mandamus to a judge of the General Court of Justice. A judge of the superior court has no authority or jurisdiction to issue a writ of mandamus . . . to a district court judge.”). Consequently, if mandamus were the appropriate remedy in this case, it would be error for our Court to deny Defendant’s petitions on that basis.

Nevertheless, as the majority correctly concludes, albeit for different reasons than I, mandamus is *not* the proper remedy here. Defendant fails to “demonstrate a clear legal right to the act[s] requested.” *In re T.H.T.*, 362 N.C. at 453, 665 S.E.2d at 59; *see also* N.C. Gen. Stat. § 20-38.6(a) (setting forth the limited motions and procedures available for defense of implied-consent offenses in the district courts).

Nor can it be said that the Wake County District Attorney has a “clear and not reasonably debatable” legal duty to reinstate Defendant’s criminal charges under these circumstances. *In re T.H.T.*, 362 N.C. at 453-54, 665 S.E.2d at 59. Indeed, the statutes governing the dismissal of criminal charges in implied-consent cases—and the rights of defendants whose failure to appear triggers dismissal—are anything but clear. *Compare* N.C. Gen. Stat. § 15A-932(a)(2) (providing that a “prosecutor may enter a dismissal with leave for nonappearance when a defendant . . . [f]ails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found”), *with id.* § 20-24.1(a), (b1) (providing that although the DMV “*must* revoke the driver’s license of a person upon receipt of notice from a court that the person was charged with a motor vehicle offense and he . . . failed to appear, after being notified to do so, when the case was called for a trial or hearing[.]” the defendant nevertheless “*must* be afforded an opportunity for a trial or a hearing within a reasonable time of the defendant’s appearance” (emphases added)).

As these convoluted and often contradictory statutes illustrate, implied-consent law is rarely clear. For our purposes, however, it is sufficient to note that Defendant has failed to demonstrate a clear legal right to the acts he seeks to compel—i.e., the Wake County District Attorney’s reinstatement of his criminal charges, followed by a trial or

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hearing in Wake County District Court—as this determination is fatal to his petitions for the writ of mandamus.

Accordingly, I concur in the majority’s denial of Defendant’s (1) Alternative Petition for Writ of Mandamus, and (2) Second Alternative Petition for Writ of Mandamus.

**B. Certiorari**

Contrary to the majority, I conclude that Defendant has met his burden of showing that the superior court abused its discretion by denying his petition for writ of certiorari. For the reasons set forth below, I would reverse the superior court’s order denying Defendant’s petition for writ of certiorari and remand for a hearing and decision on the merits.

*The Nature of Certiorari*

It is well settled that “[a]ppeals in criminal cases are controlled by the statutes on the subject.” *State v. King*, 222 N.C. 137, 140, 22 S.E.2d 241, 242 (1942) (citation omitted). Our statutes, however, do not provide for appeal from the district court’s denial of a defendant’s motion to reinstate criminal charges. Nevertheless, in such instances, “the defendant is not without a remedy. The remedy, retained by statute, approved by the court and generally pursued, is *certiorari* to be obtained from the Superior Court upon proper showing aptly made.” *Id.* at 140, 22 S.E.2d at 243 (citations omitted); *see also* N.C. Gen. Stat. § 1-269 (“Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use.”).

The superior court has jurisdiction to issue a writ of certiorari to review district court proceedings pursuant to Rule 19 of the General Rules of Practice for the Superior and District Courts. Rule 19 provides, in pertinent part: “In proper cases and in like manner, the court may grant the writ of certiorari. When a diminution of the record is suggested and the record is manifestly imperfect, the court may grant the writ upon motion in the cause.”

A superior court’s authority “to grant the writ of certiorari in appropriate cases is . . . analogous to [this Court’s] power to issue a writ of certiorari pursuant to N.C. Gen. Stat. § 7A-32(c).” *State v. Hamrick*, 110 N.C. App. 60, 65, 428 S.E.2d 830, 832-33, *appeal dismissed and disc. review denied*, 334 N.C. 436, 433 S.E.2d 181 (1993). As our Supreme Court long ago explained:

[T]he Superior Court will always control inferior magistrates and tribunals, in matters for which a writ of error lies not, by *certiorari*, to bring up their judicial proceedings to

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be reviewed in the matter of law; for in such case “the *certiorari* is in effect a writ of error,” as all that can be discussed in the court above are the form and sufficiency of the proceedings as they appear upon the face of them. . . . It is . . . essential to the uniformity of decision, and the peaceful and regular administration of the law here, that there should be some mode for correcting the errors, in point of law, of proceedings not according to the course of the common law, where the law does not give an appeal; and, therefore, from necessity, we must retain this use of the *certiorari*.

*State v. Tripp*, 168 N.C. 150, 155, 83 S.E. 630, 632 (1914).

“*Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown.” *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). “A petition for the writ must show merit or that error was probably committed below.” *Id.* (citing *In re Snelgrove*, 208 N.C. 670, 672, 182 S.E. 335, 336 (1935)).

“Two things . . . should be made to appear on application for *certiorari*: First, diligence in prosecuting the appeal, except in cases where no appeal lies, when freedom from laches in applying for the writ should be shown; and, second, merit, or that probable error was committed” below. *Snelgrove*, 208 N.C. at 672, 182 S.E. at 336 (citation and quotation marks omitted). Our Supreme Court has interpreted “merit” in this context to mean that a petitioner must show “that he has reasonable grounds for asking that the case be brought up and reviewed on appeal.” *Id.*

*Analysis*

On appeal, Defendant alleges that the Wake County District Attorney’s Office “refus[es] to reinstate the charges unless [Defendant] enters a plea of guilty and waives his right to appeal[.]” Defendant lacks an appeal of right from the district court’s order denying his motion to reinstate the charges, or from the superior court’s denial of his petition for writ of *certiorari*. Accordingly, Defendant filed a petition for writ of *certiorari* seeking this Court’s review of the superior court’s order. In our discretion, we allowed Defendant’s petition for writ of *certiorari*. However, the majority’s opinion fails to sufficiently address that order, which is now squarely before us, pursuant to the determination of a panel of our Court that Defendant’s appeal presented “appropriate

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circumstances” to support issuing a writ of certiorari in order to enable our review. N.C.R. App. P. 21(a)(1).

As Defendant correctly notes, the discretionary nature of certiorari “does not mean that the Superior Court can deny the writ for any reason.” While acknowledging that “the discretion of a trial court is not blanket authority, and must have some basis in reason[,]” the majority nevertheless misinterprets Defendant’s argument as an assertion that “the trial court abused its discretion in denying the writ because he was *entitled* to it.” *Majority* at 6. Yet, in faulting Defendant for arguing “too far afield[,]” *id.*, the majority inadvertently commits the same error.

For example, the majority asserts:

Even assuming *arguendo* that the District Court’s denial of [D]efendant’s motion to reinstate the charges was erroneous, the Superior Court was not obligated to grant certiorari to review it. The result would be unfortunate, but such is the case with discretionary writs. They are, by nature, discretionary.

....

It is not enough that he disagree with it, or argue – incorrectly – that the trial court was obligated to grant his petition. Defendant has to show that the Superior Court’s decision was unsupported by reason or otherwise entirely arbitrary.

*Id.* at 6-7.

As the majority explains, an abuse of discretion occurs when the trial court’s ruling is “manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *Id.* at 7 (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)). Here, the superior court’s order fails to reveal any basis for its rationale. The order lacks any explanation for the basis of the superior court’s decision, other than the conclusory statements that “Defendant has failed to provide ‘sufficient cause’ to support the granting of his Petition” and “is not entitled to the relief requested[.]” And because all of the “motions and proceedings in this matter were adjudicated in chambers” without the benefit of recordation or transcription, the record before this Court fails to disclose the basis for the superior court’s decision, as well.

Moreover, it is not clear that Defendant could meet the standard embraced by the majority under *any circumstances*, given the majority’s

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refusal to “address the merits of the petition to the superior court in the instant case.” *Id.* at 5 (citation and quotation marks omitted). I agree that the question of “whether the District Court erred in denying the motion to reinstate the charges” is not before us. *Id.* at 7. But this does not preclude our consideration of the allegations raised in Defendant’s petition for writ of certiorari—i.e., his request that *the superior court* review the district court’s denial of his motion to reinstate the charges. Indeed, how are we to fully review the superior court’s order denying Defendant’s petition without addressing its contents?

The superior court’s unsupported conclusion that Defendant “failed to provide ‘sufficient cause’ to support the granting of his Petition” conflicts with our well-established standard for demonstrating merit and good cause for issuance of the writ of certiorari. A petitioner is not required to demonstrate a likelihood of success in every instance, merely (1) “diligence in prosecuting the appeal, *except in cases where no appeal lies, when freedom from laches in applying for the writ should be shown*”; and (2) “merit, or that probable error was committed” below. *Snelgrove*, 208 N.C. at 672, 182 S.E. at 336 (emphasis added); cf. *State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017) (“As Bishop concedes, he cannot prevail on [his Fourth Amendment challenge to the trial court’s order imposing lifetime satellite-based monitoring] without the use of Rule 2 because his constitutional argument is waived on appeal. In our discretion, *we decline to issue a writ of certiorari to review this unpreserved argument on direct appeal.*” (emphasis added)).

Clearly, Defendant’s petition contains all of the required information, and his arguments show merit, as we have interpreted that standard, to support the issuance of a writ of certiorari in order to enable review on the record. In his petition to the superior court, Defendant raised numerous, detailed arguments alleging violations of his statutory and constitutional rights arising from the State’s refusal to reinstate his criminal charges, including that:

- (1) The Wake County District Court failed to comply with N.C. Gen. Stat. § 20-24.1(b1)’s requirement that a defendant whose license is revoked due to his failure to appear after being charged with a motor vehicle offense “must be afforded an opportunity for a trial or a hearing within a reasonable time” of his appearance. N.C. Gen. Stat. § 20-24.1(b1). “Upon motion of a defendant, the court must order that a hearing or a trial be heard within a reasonable time.” *Id.* Defendant alleges that the hearing dates provided to him “were merely illusory



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as no opportunity for a trial or hearing actually existed on these dates.”

- (2) The Wake County District Attorney’s decision declining to reinstate Defendant’s criminal charges was made for an improper purpose—namely, to coerce him to plead guilty. Citing a variety of authorities for support, Defendant further alleges that the circumstances of the instant case evince a pattern of “systematic prosecutorial misconduct” on the part of the Wake County District Attorney’s Office, which the District Court had the authority to address.
- (3) The District Attorney’s refusal to reinstate his criminal charges violates his constitutional rights to due process and a speedy trial. According to Defendant, “a due process violation exists when a prosecutor exercises his calendaring authority to gain a tactical advantage over a criminal defendant.” For support, Defendant cites *Klopper v. North Carolina*, 386 U.S. 213, 18 L. Ed. 2d 1 (1967), and *Simeon v. Hardin*, 339 N.C. 358, 451 S.E.2d 858 (1994).

To be clear, I offer no opinion on the likelihood of Defendant’s success on the merits of his petition, nor, as previously explained, is that question before us at this juncture. *See State v. Ross*, 369 N.C. 393, 400, 794 S.E.2d 289, 293 (2016) (“The decision concerning whether to issue a writ of certiorari is discretionary, and thus, the Court of Appeals may choose to grant such a writ to review some issues that are meritorious but not others for which a defendant has failed to show good or sufficient cause. As such, the two issues that [the] defendant raised in his petition for writ of certiorari to the Court of Appeals have not survived that court’s decision to allow the writ for the limited purpose of considering the voluntariness of his guilty plea.” (internal citation omitted)).

However, Defendant’s petition for writ of certiorari contains cogent, well-supported arguments alleging statutory and constitutional violations akin to those at issue in *Klopper* and *Simeon*, which—if true—are certainly concerning. He has no other avenue to seek redress for these alleged legal wrongs, because he has no right to appeal from the denial of his motion to reinstate charges. And if he pleads guilty, as the State intends, he waives his right to appeal altogether. This is no bargain.

The open courts clause, Article I, Section 18 of the North Carolina Constitution, guarantees a criminal defendant a speedy trial, an impartial tribunal, and access to the court to apply for redress of injury. While this clause does not



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outlaw good-faith delays which are reasonably necessary for the state to prepare and present its case, it does prohibit purposeful or oppressive delays and those which the prosecution could have avoided with reasonable effort. Furthermore, Article I, Section 24 of the North Carolina Constitution grants every criminal defendant the absolute right to plead not guilty and to be tried by a jury. *Criminal defendants cannot be punished for exercising this right.*

*Simeon*, 339 N.C. at 377-78, 451 S.E.2d at 871 (emphasis added) (internal citations and quotation marks omitted).

Quite plainly, Defendant has no alternate means to seek redress of the issues raised in his petition before the superior court. The majority's opinion fails to address the issues raised in Defendant's petition—a necessary consideration upon review of the superior court's order denying his request for the writ of certiorari. For all of these reasons, I respectfully dissent.

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STATE OF NORTH CAROLINA  
v.  
JUANITA NICOLE LEBEAU, DEFENDANT

No. COA19-872

Filed 21 April 2020

**1. Jurisdiction—to amend a criminal judgment—two requirements for divestment of jurisdiction**

In a prosecution for trafficking in methadone, the trial court retained jurisdiction to amend the judgment against defendant five days after its entry where defendant had already filed notice of appeal but the fourteen-day period for doing so (under Appellate Rule 4(a)(2)) had not elapsed. Under N.C.G.S. § 15A-1448(a)(3), a trial court is only divested of jurisdiction when both a notice of appeal has been given and the period for taking appeals has elapsed.

**2. Sentencing—right to be present—to hear sentence—amended judgment—no substantive change**

In a prosecution for trafficking in methadone, where the trial court later amended the judgment against defendant in her absence, the court did not violate defendant's right to be present to hear her sentence because the amendment did not effect a substantive

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change to that sentence. Instead, where the original judgment sentenced defendant to 70 months of imprisonment and the amended judgment sentenced her to a minimum of 70 months and a maximum of 93 months—thereby reflecting the required sentence for defendant’s trafficking charge under N.C.G.S. § 90-95(h)(4)—the amendment merely corrected a clerical error and clarified that the sentence would comport with the applicable statute.

Appeal by Defendant from judgment entered 15 April 2019 by Judge Marvin Pope in Avery County Superior Court. Heard in the Court of Appeals 1 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Asher P. Spiller, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for the Defendant.*

BROOK, Judge.

Juanita Nicole Lebeau (“Defendant”) appeals from judgment entered upon jury verdicts on 10 April 2019 and amended 15 April 2019 for trafficking in methadone. We hold that the trial court retained jurisdiction to amend its judgment. We further hold that the 15 April 2019 amendment to the judgment did not violate Defendant’s right to be present at sentencing. Accordingly, we find no error.

### I. Factual and Procedural Background

Defendant was arrested on 6 October 2017 and indicted 20 August 2018 on charges related to drug offenses that took place in April and May of 2017. On 10 April 2019, an Avery County jury found her guilty of one count of trafficking between four and fourteen grams of methadone and two counts of selling methadone, a Schedule II narcotic. For sentencing purposes, the two counts of selling methadone were consolidated under the one count of trafficking. The sentence announced in open court on April 10 was “a mandatory 70 months” of active imprisonment. The written judgment reflected both a minimum and a maximum sentence of 70 months’ active time.

The next day, the Avery County Clerk of Court sent Judge Pope an email asking two questions: First, whether he ought to indicate a maximum term for Defendant’s sentence; and second, how to resolve a handful of inconsistencies among the verdict sheet, the indictment, the court

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calendar, and the written judgment. In some places, the primary charge was listed as “PWISD Sch. II,” i.e., trafficking. In others, it was listed as “Sale of Sch. II CS.” Judge Pope replied the same afternoon clarifying that he had consolidated the two counts of selling methadone under the trafficking count, a Class F felony “for which [Defendant] received 70 to 93 months.”

On 15 April 2019, Judge Pope entered an amended judgment sentencing Defendant to a minimum of 70 and a maximum of 93 months of confinement, reflecting the sentence prescribed for her trafficking offense by N.C. Gen. Stat. § 90-95(h)(4).

Defendant timely noticed appeal.

## II. Analysis

On appeal, Defendant argues that the amended judgment must be vacated and the case remanded for resentencing. Specifically, she argues her sentence was amended after the trial court had been divested of jurisdiction over her case. In the alternative, she argues that even if the trial court had jurisdiction on 15 April 2019 when it amended her sentence, it did so in her absence and thus denied her the right to be present to hear her sentence.

We address these arguments in turn.

### A. Jurisdiction

[1] Defendant contends the trial court lost jurisdiction over her case when she entered notice of appeal, and that the amendment corrected an error in judicial reasoning and thus depended on the trial court’s continuing jurisdiction for its validity. The State argues that the trial court had jurisdiction when it amended Defendant’s sentence. It contends a trial court is only divested of jurisdiction when both (1) a notice of appeal has been given and (2) the period for taking appeals has elapsed.

As explained below, we agree with the State that the trial court retained jurisdiction.

#### 1. Standard of Review

Whether the trial court had jurisdiction is a question of law that we review de novo. *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012).

#### 2. Merits

“The jurisdiction of the trial court with regard to the case is divested . . . when notice of appeal has been given *and* the period described in

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(1) and (2) has expired.” N.C. Gen. Stat. § 15A-1448(a)(3) (2019) (emphasis added). Subsection (1) refers to “the period provided in the rules of appellate procedure for giving notice of appeal.” *Id.* § 15A-1448(a)(1).<sup>1</sup> The North Carolina Rules of Appellate Procedure allow a written notice of appeal in a criminal case to be filed 14 days after the entry of a judgment. N.C. R. App. P. 4(a)(2) (2019). Therefore, under the plain language of § 15A-1448(a)(3), the trial court has jurisdiction until notice of appeal has been given and 14 days have passed.

Defendant cites *State v. Davis*, 123 N.C. App. 240, 427 S.E.2d 392 (1996), for the proposition that a notice of appeal alone terminates a trial court’s jurisdiction. In that case, we stated that “[t]he general rule is that the jurisdiction of the trial court is divested when notice of appeal is given[.]” *State v. Davis*, 123 N.C. App. 240, 242, 427 S.E.2d 392, 393 (1996). But we do not read *Davis*’s description of a “general rule” to nullify *in toto* one of the statute’s conjunctive requirements for the divestment of jurisdiction. A “general rule” by its terms does not preclude the operation of more specific statutory provisions, as the plain text of § 15A-1448(a)(3) requires. “Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning.” *State v. Wagoner*, 199 N.C. App. 321, 324, 683 S.E.2d 391, 395 (2009). Moreover, *Davis* concerned a sentence amended months after it was first entered, well after the expiration of the 14-day window for filing a notice of appeal, and is therefore distinguishable. 123 N.C. App. at 241, 427 S.E.2d at 393 (holding trial court was without jurisdiction to amend the defendant’s sentence when it did so in the course of amending the record on appeal).

Only five days passed between the entry of the original judgment in this case and its subsequent amendment. The trial court thus retained jurisdiction over the matter.

**B. The Right to be Present**

**[2]** Defendant next argues that because the amended April 15 judgment was entered in her absence, she was deprived of her right to be present to hear her sentence. Defendant contends this right is violated when “the written judgment contains any substantive change from the sentence pronounced in defendant’s presence.” The State argues that because the sentence imposed is statutorily required by N.C. Gen. Stat. § 90-95(h)(4) for the offense under which Defendant’s guilty verdicts

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1. Subsection (2) involves instances when a motion for appropriate relief has been made and, as such, is inapplicable here. N.C. Gen. Stat. § 15A-1448(a)(2) (2019).

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were consolidated, the sentence inhered in the verdict and thus was not actually changed by the entry of the amended judgment. The judgment's amendment, in other words, was the "non-discretionary byproduct" of the verdict, notwithstanding the trial court's failure to properly record the upper end of that mandatory sentence. *State v. Arrington*, 215 N.C. App. 161, 167, 714 S.E.2d 777, 782 (2011). We agree with the State and conclude that the amended judgment did not effect a substantive change to Defendant's sentence.

**1. Standard of Review**

We review the propriety of an amended judgment entered outside the defendant's presence de novo. *Id.* at 166, 714 S.E.2d at 781.

**2. Merits**

Criminal defendants have a right to be present to hear the entry of their sentences. *State v. Mims*, 180 N.C. App. 403, 413, 637 S.E.2d 244, 250 (2006). Defendant was present to hear her sentence as it was imposed and announced on 10 April 2019. The question is whether the April 15 amended judgment "represent[ed] a substantive change from the sentence pronounced by the trial court[.]" *Id.*

We have found a change to be substantive where a trial court has materially altered the length or the terms of a defendant's sentence in the defendant's absence. *See, e.g., State v. Hanner*, 188 N.C. App. 137, 141, 654 S.E.2d 820, 823 (2008) (finding a substantive change where multiple sentences were amended to run consecutively rather than concurrently); *Mims*, 180 N.C. App. at 414, 637 S.E.2d at 250-51 (vacating nine months' intensive probation imposed in written judgment but not orally in open court); *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999) (vacating amendment to defendant's sentences causing them to run consecutively rather than concurrently). In each of these cases, the trial court modified the defendant's sentence as an otherwise permissible exercise of judicial discretion. *See, e.g., State v. Harris*, 111 N.C. App. 58, 71, 431 S.E.2d 792, 800 (1993) ("The sentencing judge [] retains the discretion to impose multiple sentences to run consecutively or concurrently.").

On the other hand, changes that merely correct clerical errors are not substantive. A clerical error is one that results "from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quoting Black's Law Dictionary, 7th ed. 1999). Similarly, our Court in *Arrington*

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concluded that an amendment to include statutorily required fines accompanying the punishment imposed was not a substantive change but a statutorily “necessary byproduct” of the sentence. *Arrington*, 215 N.C. App. at 168, 714 S.E.2d at 782. A change is therefore not substantive when it corrects a clerical error or clarifies that a sentence will comport with applicable statutory limits on the trial court’s sentencing discretion.

North Carolina law requires that the sentence imposed for Defendant’s conviction be a minimum of 70 months and a maximum of 93 months. N.C. Gen Stat. § 90-95(h)(4)(a) (2019). It also requires that “[t]he maximum term shall be specified in the judgment of the court.” N.C. Gen Stat. § 15A-1340.13(c) (2019). The judge is to enter the sentence required by the conviction, and subsequent discretion to adjust the time served within that mandatory range is left to state correctional officers. *Id.* § 15A-1340.13(d).

Here, the trial court’s discretion was bound in both procedural and substantive terms such that the amended sentence did not represent a novel exercise of judicial discretion in Defendant’s absence, as it did in *Crumbley*, *Mims*, and *Hanner*. Rather, the amendment reflects the only sentence the court could legally impose given the verdict rendered—“a non-discretionary byproduct of the sentence that was imposed in open court.” *Arrington*, 215 N.C. App. at 167, 714 S.E.2d at 782.

Further, “a court of record has the inherent power and duty to make its records speak the truth.” *State v. Cannon*, 244 N.C. 399, 403, 94 S.E.2d 339, 342 (1956). The trial court is entitled to a presumption of regularity; that is, the presumption that “public officials [] discharge their duties in good faith and exercise their powers in accord with the spirit and purpose of the law.” *State v. Ferrer*, 170 N.C. App. 131, 136, 611 S.E.2d 881, 884 (2005) (internal marks and citations omitted).

It is presumed, in the absence of evidence to the contrary, that acts of a public officer within the sphere of his official duties, and purporting to be exercised in an official capacity and by public authority, are within the scope of his authority and *in compliance with controlling statutory provisions*.

*Civil Service Bd. of City of Charlotte v. Page*, 2 N.C. App. 34, 40, 162 S.E.2d 644, 647 (1968) (emphasis added).

Although on its face the initial April 10 judgment purported to sentence Defendant to a minimum and maximum term of 70 months, that sentence would violate state law by both failing to impose the *correct* sentence pursuant to § 90-95(h)(4) and by failing to

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specify *the* maximum term—not just *any* maximum term—required by § 15A-1340.13(c). Adhering to the presumption of regularity, we presume—absent any evidence to the contrary—that Judge Pope meant on both April 10 and April 15 to assign Defendant the sentence made mandatory by the “controlling statutory provisions.” *Id.*

This presumption is supported by Judge Pope’s response to the Clerk of Court’s April 11 email inquiry, in which he explained that he had “consolidated everything into Count I . . . for which [Defendant] *received*”—in the past tense—“70 to 93 months.” (Emphasis added.) During the 10 April 2019 sentencing hearing, Judge Pope also announced “[t]he defendant is sentenced to a *mandatory* 70 months,” (emphasis added), suggesting he understood his discretion was bound by statute.

Unlike *Mims*, where remanding for resentencing was required in part because “the transcript [was] void of any reference to [the revised] sentence[,]” the transcript in this case made reference to the “mandatory” nature of the sentence prescribed by statute. *Mims*, 180 N.C. App. at 413, 637 S.E.2d at 250.

We therefore conclude that the amended judgment does not reflect a substantive change to Defendant’s sentence such that Defendant had a right to be present for the rendering of the amended judgment because the trial court retained “the inherent power and duty to make its records speak the truth[.]” *Cannon*, 244 N.C. at 403, 94 S.E.2d at 342, and thus the amended judgment comports both with the sentence announced and with the statutorily required sentence.

## III. Conclusion

We conclude that the trial court retained jurisdiction over Defendant’s case because only five days elapsed between the entry of the first judgment and the entry of the amended judgment. Further, because the substance of Defendant’s sentence was wholly preordained by statute, and because we presume that the trial court intended to follow the law, we conclude that the April 15 amendment reflects a clerical clarification rather than a substantive change. We therefore hold the trial court did not err in amending the judgment to reflect the mandatory sentence required by statute.

NO ERROR.

Judges TYSON and ZACHARY concur.

**STATE v. LINDSEY**

[271 N.C. App. 118 (2020)]

STATE OF NORTH CAROLINA

v.

DERRICK LINDSEY, DEFENDANT

No. COA19-974

Filed 21 April 2020

**1. Appeal and Error—preservation of issues—right to assistance of counsel—failure to object—statutory mandate**

In a prosecution for breaking and entering, larceny, and injury to real property, defendant's argument alleging a deprivation of his constitutional right to assistance of counsel was preserved for appellate review—despite defendant's failure to object at trial—in light of the statutory mandate in N.C.G.S. § 15A-1242 protecting Sixth Amendment rights.

**2. Constitutional Law—assistance of counsel—failure to obtain valid waiver until trial—prejudicial error**

In a prosecution for breaking and entering, larceny, and injury to real property, the trial court erred in failing to either appoint counsel for defendant or secure a valid waiver of counsel until defendant's trial—more than a year after his arrest. Instead, the court impermissibly allowed defendant to proceed pro se during the pretrial phase where defendant expressly waived his right to court-appointed counsel but did not clearly state an intention to represent himself, and where the court failed to conduct the entire three-part inquiry under N.C.G.S. § 15A-1242 to ensure that defendant knowingly, intelligently and voluntarily waived his right to all counsel. Moreover, the State failed to make any showing, as required, that this error was harmless beyond a reasonable doubt.

Judge DILLON dissenting.

Appeal by Defendant from judgment entered 13 March 2019 by Judge Kevin M. Bridges in Stanly County Superior Court. Heard in the Court of Appeals 18 March 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Victoria L. Voight, for the State.*

*Sarah Holladay for Defendant.*



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[271 N.C. App. 118 (2020)]

BROOK, Judge.

Derrick Lindsey (“Defendant”) appeals from judgment entered upon jury verdicts of guilty for felony breaking and entering, felony larceny, and misdemeanor injury to real property. On appeal, Defendant argues the trial court erred in failing to either appoint counsel or secure a valid waiver of counsel until his trial—more than a year after his arrest. Defendant further argues that the trial court committed plain error in allowing secondary evidence of the contents of a videotape where the State failed to establish that the videotape itself was unavailable. Finally, Defendant argues that the trial court erred in entering a civil judgment for attorney’s fees of standby counsel against Defendant without giving him notice and opportunity to be heard.

We agree with Defendant that he is entitled to a new trial because the trial court did not ensure Defendant validly waived the assistance of counsel prior to trial, and the State has failed to show that the error was harmless beyond a reasonable doubt. We therefore need not reach Defendant’s remaining issues on appeal.

**I. Factual and Procedural Background**

Because the issue dispositive to this appeal does not relate to the facts surrounding the alleged crimes or the trial, a detailed recitation of both is unnecessary. Briefly, the State’s evidence tended to show that Defendant broke into a gas station, stole two packs of Newport 100 cigarettes, and broke a window lock in the process. Defendant was arrested on 7 March 2018 and remained in custody through his trial on 12 March 2019.

On 23 April 2018, Defendant filed pro se motions requesting discovery and a subpoena so he could subpoena evidence. On 22 May 2018, Defendant mailed a letter to the clerk of court asking for a status update. On 7 June 2018, Defendant filed a pro se motion to dismiss for lack of an enacting clause and lack of subject matter jurisdiction. The Assistant Clerk of Stanly County Superior Court responded by letter indicating that Defendant’s motion had been sent to the district attorney’s office for review and stating as follows: “[Y]our case has been continued to the August 20, 2018 term of Superior Court. There will be a Writ issued to bring you in front of the judge at that time. You may address your concerns and motions with the Presiding Judge when deemed appropriate by the Presiding Judge.” On 27 July 2018, Defendant filed a pro se motion for an audit trail on the bond that was set.

On 20 August 2018, Judge Jeffery K. Carpenter first addressed Defendant’s right to counsel in the following exchange:

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[THE COURT]: [Defendant], you're here on a felony breaking or entering. It's a Class H felony which carries a maximum sentence of 39 months; a larceny after breaking or entering, a Class H felony which carries a maximum sentence of 39 months; and an injury to real property, a Class one misdemeanor which carries a maximum punishment sentence of 120 days.

You have three options in regards to counsel or representation. You can hire your own lawyer, represent yourself or ask me to consider you for court appointed counsel.

[DEFENDANT]: I can speak for myself.

[THE COURT]: Do you want a lawyer to represent you?

[DEFENDANT]: No.

[THE COURT]: [Defendant], I need you to sign a waiver to counsel. [Defendant], you're wanting to waive all rights to counsel? Did I understand you correctly on that? You're not just waiving court appointed counsel, you're waiving all counsel; is that correct?

[DEFENDANT]: I'm not waiving any rights. I'm simply waiving court appointed counsel.

[THE COURT]: So you want to waive court appointed counsel?

[DEFENDANT]: Yes.

[THE COURT]: He's waiving court appointed counsel. [Defendant], I am told that the assistant district attorney that has been assigned to handle your case is in district court. They are going to see if they can come over here and give you an opportunity to talk to them and see if you all can come to a resolution.

When the assistant district attorney came back to the courtroom during that same court session, she addressed the court and said, "[O]ur office received a pro se discovery request from [Defendant], and upon checking out his file, he hasn't addressed counsel. It's my understanding that has been done in my absence, that he has requested to hire his own counsel." Judge Carpenter responded, "He did not do that. He just waived court appointed counsel." Judge Carpenter then continued

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Defendant's case to 22 October 2018. Defendant signed a waiver of counsel form, acknowledging his right to counsel and checking box one, which read, "I waive my right to assigned counsel and that I, hereby, expressly waive that right." Judge Carpenter, in the same form, certified that Defendant voluntarily, knowingly, and intelligently elected to be tried "without the assignment of counsel." Judge Carpenter subsequently appointed Andrew Scales as standby counsel for Defendant.

During the October 2018 session,<sup>1</sup> Judge Carpenter permitted Defendant to argue his pro se motion to dismiss for lack of an enacting clause and for lack of subject matter jurisdiction. Mr. Scales served only as standby counsel at this hearing; to wit, he did not assist Defendant with his argument or otherwise substantively participate in the hearing. Judge Carpenter denied Defendant's motion and set Defendant's case for trial on 14 January 2019. Judge Carpenter also clarified that he had appointed Mr. Scales as Defendant's standby counsel and that Mr. Scales would continue in that role.

The record is silent as to what happened on 14 January 2019. However, on 20 January 2019, Defendant filed a pro se motion with the court which read:

My court date was set on 1-14-19 but I was never called to court. I signed a wa[i]ver of attorn[e]y so there is no court appointed attorney on this case. Can you please tell me why this case was continued without my consent and without me being present in court. This is a violation of my constitutional right to due process of law.

The Assistant Clerk of Stanly County Superior Court responded by letter that "I can only advise that the case was continued from 1/14/2019 to 2/18/2019, we are only the record keepers and I cannot say as to a reason for the continuance. I have forwarded a copy of your letter to the District Attorney's office." The record is also silent as to the 18 February 2019 session.

On 12 March 2019, Defendant's case proceeded to trial. Before trial, Judge Kevin Bridges spoke with Defendant, saying, "I noticed that you

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1. The record is unclear as to whether the next court date was 22 October 2018 or 24 October 2018. The Stanly County Clerk of Superior Court sent a letter to Defendant that his next court date was 22 October 2018, but the transcript of the proceedings is dated both 22 October 2018 and 24 October 2018. The appointment of counsel form is dated 24 October 2018, but during the court session Defendant's standby counsel indicated that he had already been "appointed in some way[.]" We will refer to this as the October 2018 session.

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did sign a waiver before the Honorable Judge Carpenter on 20 August 2018, but that was only a waiver of your right to court-appointed counsel. [] [I]f you intend to proceed *pro se*, ideally I need a waiver of all counsel.” Defendant elected to proceed *pro se*, and Judge Bridges secured a full waiver as follows:

[THE COURT]: Sir, I just want to confirm with you, first of all, you are Derrick Lindsey.

[DEFENDANT]: I’m here concerning that matter.

...

[THE COURT]: All right. You understand you have the right to remain silent. Anything you say may be used against you. Do you understand that?

[DEFENDANT]: I comprehend this.

...

[THE COURT]: All right. Thank you. Sir, I just want to be clear that you understand that you are charged with breaking and/or entering, which is a Class H felony, which carries a maximum punishment of up to 39 months in prison. Also, you are charged with larceny after breaking and entering, punishable by a maximum of up to 39 months in prison. And also you’re charged with injury to real property, a Class 1 misdemeanor, punishable by a maximum of up to 120 days.

Do you understand that sir?

[DEFENDANT]: Yes, sir.

[THE COURT]: Am I correct that you still want to proceed *pro se*? Meaning you want to represent yourself in this trial.

[DEFENDANT]: I am speaking for myself. Yes, I am.

[THE COURT]: All right. Then I need to ask you some additional questions, sir. Are you able to hear and understand me clearly?

[DEFENDANT]: Yes, I am.

[THE COURT]: Are you now under the influence of any alcoholic beverages, drugs, narcotics, or pills?

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[DEFENDANT]: No, I'm not.

[THE COURT]: How old are you, sir?

[DEFENDANT]: 35.

[THE COURT]: Have you completed high school?

[DEFENDANT]: Yes, I have.

[THE COURT]: So you can read and write?

[DEFENDANT]: Yes, I can.

[THE COURT]: Do you suffer from any mental or physical handicaps?

[DEFENDANT]: No, sir.

[THE COURT]: Do you understand that you do have the right to be represented by a lawyer, and if you cannot afford one the court will look into appointing one for you?

[DEFENDANT]: Yes.

[THE COURT]: Do you understand that if you do decide to represent yourself you must follow the same rules of evidence and procedure that a lawyer would follow in court?

[DEFENDANT]: Yes, I do.

[THE COURT]: Do you understand that if you do decide to represent yourself the Court will not give you any legal advice concerning any issues that may arise in your case?

[DEFENDANT]: I do.

[THE COURT]: Do you understand the Court's role is to be fair and impartial to both sides?

[DEFENDANT]: Yes, I do.

[THE COURT]: All right. Based on what I just said to you, do you have any questions at all before me about your right to a lawyer?

[DEFENDANT]: No.

[THE COURT]: At this time then do you now waive your right to assistance of a lawyer and voluntarily and intelligently decide to represent yourself in these cases?

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[DEFENDANT]: Yes, sir.

Defendant then signed another waiver of counsel form, this time acknowledging his right to assistance of counsel and checking box 2, which read, “I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear on my own behalf, which I understand I have the right to do.” Judge Bridges signed the same waiver, certifying that Defendant voluntarily, knowingly, and intelligently elected to be tried “without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.”

Mr. Scales continued as standby counsel for the duration of Defendant’s trial and sentencing. Defendant was sentenced to two terms of 11 to 23 months’ active imprisonment to run consecutively.

**II. Standard of Review**

As noted by this Court in *State v. Watlington*, 216 N.C. App. 388, 716 S.E.2d 671 (2011), “[p]rior cases addressing waiver of counsel under N.C. Gen. Stat. § 15A-1242 have not clearly stated a standard of review, but they do, as a practical matter, review the issue *de novo*.” *Id.* at 393-94, 716 S.E.2d at 675. We will, as we did in *Watlington*, review this issue *de novo*. *Id.* at 394, 716 S.E.2d at 675. “Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and marks omitted).

**III. Analysis**

On appeal, Defendant contends that the trial court erred in failing to appoint counsel or secure a valid waiver of counsel until more than a year after Defendant’s arrest. Defendant argues that the State has not proved beyond a reasonable doubt that the deprivation of the right to counsel from arrest to trial was not harmless beyond a reasonable doubt. In the alternative, Defendant argues that this error occurred at a critical stage of the proceedings and is thus *per se* prejudicial error requiring a new trial.

For the reasons stated below, we agree with Defendant that the trial court erred in failing to appoint counsel or secure a valid waiver and, further, that the State has not proved that the deprivation of counsel during this pre-trial period was harmless beyond a reasonable doubt. Therefore, we do not reach his argument in the alternative.

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## A. Preservation

[1] As an initial matter, we briefly address the dissent’s argument that these matters are not preserved for appellate review.

“[T]he right to have the assistance of counsel is” one of “those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” *Powell v. Alabama*, 287 U.S. 45, 66-67, 53 S. Ct. 55, 63, 77 L. Ed. 158, 169 (1932) (internal marks and citations omitted). “When an accused manages his own defense, he relinquishes . . . many of the traditional benefits associated with the right to counsel.” *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541, 45 L. Ed. 2d 562, 581 (1975). “For this reason[,] . . . the accused must knowingly and intelligently forgo those relinquished benefits.” *Id.* (internal marks and citations omitted).

In North Carolina, the Sixth Amendment rights at issue are safeguarded by and inextricably intertwined with an effectuating statute—N.C. Gen. Stat. § 15A-1242. The waiver inquiry mandated by N.C. Gen. Stat. § 15A-1242 serves to ensure any waiver of counsel is knowing, voluntary, and intelligent. *See State v. Fulp*, 355 N.C. 171, 175, 558 S.E.2d 156, 159 (2002). “It is well established that when a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding [the] defendant’s failure to object at trial.” *State v. Davis*, 364 N.C. 297, 301, 698 S.E.2d 65, 67 (2010); *see also State v. Aikens*, 342 N.C. 567, 578, 467 S.E.2d 99, 106 (1996) (“The trial court’s failure to comply with this mandatory statute relieved [the] [d]efendant of his obligation to object in order to preserve the error for review.”). Furthermore, our Supreme Court in *State v. Colbert*, 311 N.C. 283, 285, 316 S.E.2d 79, 80 (1984), and, more recently, this Court in *State v. Veney*, 259 N.C. App. 915, 918, 817 S.E.2d 114, 117 (2018) (citing *Colbert*, 311 N.C. at 285, 316 S.E.2d at 80), have reviewed unobjected-to Sixth Amendment denial of counsel claims in which the defendant was unrepresented at a court proceeding. The dissent does not mention either *Colbert* or *Veney*, let alone explain why this governing precedent does not control the outcome, nor does it identify any case law involving the circumstances at issue in support of its contention that Defendant’s constitutional arguments have been waived.

Finally, the State has not questioned whether appellate review is appropriate in such instances; in *Veney* it conceded that “it does not contest whether Defendant preserved his [constitutional] argument[,]” 259 N.C. App. at 918, 817 S.E.2d at 117, and the State takes a similar tack here.

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Defendant's overlapping constitutional and statutory arguments are properly before our Court.

## B. Merits

[2] “The Sixth Amendment of the Constitution of the United States as applied to the states through the Fourteenth Amendment guarantees an accused in a criminal case the right to the assistance of counsel for his defense.” *State v. White*, 78 N.C. App. 741, 744, 338 S.E.2d 614, 616 (1986) (citing *Gideon v. Wainwright*, 372 U.S. 335, 339-40, 83 S. Ct. 792, 794, 9 L. Ed. 2d 799, 802 (1963)). A criminal defendant also “has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.” *State v. Memis*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972). Before allowing a defendant to proceed pro se, the trial court must establish both that the defendant clearly and unequivocally expressed a desire to proceed without counsel, and that the defendant knowingly, intelligently, and voluntarily waived the right to counsel. *White*, 78 N.C. App. at 746, 338 S.E.2d at 617; see also *State v. Graham*, 76 N.C. App. 470, 474, 333 S.E.2d 547, 549 (1985) (“Absent such evidence, the court should not [] permit[] [a defendant] to proceed pro se.”).

“Without a clear and unequivocal request to waive representation and proceed pro se, the trial court should not [] proceed[] with such assumption.” *State v. Pena*, 257 N.C. App. 195, 203, 809 S.E.2d 1, 6 (2017). Exchanges that have amounted to a “clear indication” of the desire to proceed pro se have included: “The State has afforded me excellent legal counsel, but I still choose to represent myself[,]” *State v. Moore*, 362 N.C. 319, 323, 661 S.E.2d 722, 725 (2008); when the trial court asked, “But you want to proceed without an attorney?” The defendant answered, “Yes, sir[,]” *State v. Jackson*, 190 N.C. App. 437, 441, 660 S.E.2d 165, 167 (2008); the trial court asked, “Of those three choices, which choice do you make?” The defendant answered, “Represent myself[,]” *State v. Whitfield*, 170 N.C. App. 618, 621, 613 S.E.2d 289, 291 (2005). On the other hand, “[s]tatements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself.” *State v. McCrowre*, 312 N.C. 478, 480, 322 S.E.2d 775, 777 (1984).

Before a defendant waives the right to counsel, “the trial court must [e]nsure that constitutional and statutory standards are satisfied.” *State v. LeGrande*, 346 N.C. 718, 722, 487 S.E.2d 727, 729 (1997). “This Court has held that N.C.G.S. § 15A-1242 satisfies any constitutional requirements



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by adequately setting forth the parameters of such inquiries.” *Fulp*, 355 N.C. at 175, 558 S.E.2d at 159. Under N.C. Gen. Stat. § 15A-1242,

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242 (2019).

“The record must reflect that the trial court is satisfied regarding each of the three inquiries listed in the statute.” *State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 230 (2000). The trial court must specifically advise a defendant of the possible maximum punishment, *State v. Frederick*, 222 N.C. App. 576, 583, 730 S.E.2d 275, 280 (2012) (telling the defendant he could “go to prison for a long, long time” not specific), of the range of permissible punishments, *State v. Taylor*, 187 N.C. App. 291, 294, 652 S.E.2d 741, 743 (2007) (informing the defendant of the maximum imprisonment but failing to inform him of the maximum fine he could receive was inadequate), and of the consequences of representing himself, *State v. Schumann*, 257 N.C. App. 866, 877, 810 S.E.2d 379, 387 (2018) (proper inquiry where the trial court “advised Defendant representing himself would involve jury selection, motions, presenting the evidence, knowing what evidence is admissible and [said] ‘there’s a reason we have folks go to law school for years and take exams to be licensed to do this.’”). Failing to advise a defendant of any of these requirements renders the subsequent waiver invalid. *See, e.g., State v. Sorrow*, 213 N.C. App. 571, 577, 713 S.E.2d 180, 184 (2011).

As with the expression of a desire to proceed pro se, “[g]iven the fundamental nature of the right to counsel, we ought not to indulge in the presumption that it has been waived by anything less than an express indication of such an intention.” *McCroure*, 312 N.C. at 480, 322 S.E.2d at 777 (citation omitted). “The record must show, or there must be an allegation in evidence which shows, that an accused was offered counsel but intelligently and understandingly rejected the offer.

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Anything less is not waiver.”<sup>2</sup> *State v. Bines*, 263 N.C. 48, 51, 138 S.E.2d 797, 800 (1964) (citation omitted). It necessarily follows that “[t]he fact that an accused waives his right to assigned counsel does not mean that he waives all right to counsel.”<sup>3</sup> *State v. Gordon*, 79 N.C. App. 623, 625, 339 S.E.2d 836, 837 (1986). And “neither the statutory responsibilities of standby counsel [] nor the actual participation of standby counsel . . . is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver.” *State v. Dunlap*, 318 N.C. 384, 389, 348 S.E.2d 801, 805 (1986).

“It is prejudicial error to allow a criminal defendant to proceed *pro se* at any critical stage of criminal proceedings without making the inquiry required by N.C. Gen. Stat. § 15A-1242[.]” *Frederick*, 222 N.C. App. at 584, 730 S.E.2d at 281. Critical stages are those proceedings where the presence of counsel is “necessary to assure a meaningful defen[s]e.” *United States v. Wade*, 388 U.S. 218, 225, 87 S. Ct. 1926, 1931, 18 L. Ed. 2d 1149, 1156 (1967) (internal marks omitted).<sup>4</sup>

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2. There are situations in which a defendant may lose the right to counsel through conduct. *State v. Blakeney*, 245 N.C. App. 452, 460-61, 782 S.E.2d 88, 93-94 (2016). “Although the loss of counsel due to defendant’s own actions is often referred to as a waiver of the right to counsel, a better term to describe this situation is forfeiture.” *State v. Montgomery*, 138 N.C. App. 521, 524-25, 530 S.E.2d 66, 69 (2000). Forfeiture of counsel plays no role in our deliberations here as it is “restricted to situations involving egregious conduct by a defendant[.]” *State v. Simpkins*, \_\_\_ N.C. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2020 N.C. LEXIS 98 \*9 (2020) (quoting *Blakeney*, 245 N.C. App. at 461, 782 S.E.2d at 94), which the State does not and could not allege.

3. In a 2015 opinion by the North Carolina Judicial Standards Commission examining whether a judge may require a defendant to proceed without the assistance of all counsel based upon only a waiver of appointed counsel, the Commission concluded,

Except in situations where the defendant’s actions amount to a forfeiture of the right to counsel, a judge may not require a criminal defendant entitled to counsel to proceed without the assistance of counsel based on a waiver of appointed counsel only. *It is the judge’s responsibility to clarify the scope of any waiver.*

Formal Advisory Op. 2015-02 (N.C. Judicial Standards Commission) (emphasis added).

4. Amplifying further on the contours of this concept, our Supreme Court has held that “[a] critical stage has been reached when constitutional rights can be waived, defenses lost, a plea taken[.] or other events occur that can affect the entire trial.” *State v. Detter*, 298 N.C. 604, 620, 260 S.E.2d 567, 579 (1979). A probable cause hearing, *State v. Cobb*, 295 N.C. 1, 6, 243 S.E.2d 759, 762 (1978), pre-trial motion to suppress hearing, *Frederick*, 222 N.C. App. at 581, 730 S.E.2d at 279, sentencing proceeding, *State v. Davidson*, 77 N.C. App. 540, 544, 335 S.E.2d 518, 521 (1985), and probation revocation hearing, *State v. Ramirez*, 220 N.C. App. 150, 154, 724 S.E.2d 172, 174 (2012), are examples of critical stages requiring “the guiding hand of counsel[.]” *Detter*, 298 N.C. at 625, 260 S.E.2d at 583, unless waived, *see, e.g., Gordon*, 79 N.C. App. at 626, 339 S.E.2d at 838.

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Even if a critical stage has not been reached, the State must demonstrate, beyond a reasonable doubt, that the failure to obtain a knowing, voluntary, and intelligent waiver was harmless. N.C. Gen. Stat. § 15A-1443 (2019) (“A violation of the defendant’s rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless.”). This is a weighty burden for the State, as we have found harmless error only where the mistake could not “*in any way* contaminate[] the proceedings at the trial[.]” *State v. Cradle*, 281 N.C. 198, 205, 188 S.E.2d 296, 301 (1972) (emphasis added). When the State fails to carry its burden in this context, a new trial is the appropriate remedy. *See Colbert*, 311 N.C. at 286, 316 S.E.2d at 81; *see also State v. Williams*, 201 N.C. App. 728, 689 S.E.2d 601, 2010 N.C. App. LEXIS 22, at \*10 (2010) (unpublished) (“As the State has failed to show that the trial court’s error was harmless beyond a reasonable doubt, we must deem the error prejudicial and remand for a new trial.”); *State v. Hopkins*, 250 N.C. App. 184, 791 S.E.2d 903, 2016 N.C. App. LEXIS 1042, at \*9 (2016) (unpublished) (same).

Here, there are two instances in the record when the trial court advised Defendant of his right to counsel: 20 August 2018 and 12 March 2019. The parties agree, as do we, that Judge Bridges conducted a thorough inquiry of Defendant regarding his right to counsel before trial on 12 March 2019, and that Defendant knowingly, voluntarily, and intelligently waived all counsel on that date. Where the parties disagree is whether the trial court permitted Defendant to proceed pro se in the absence of a clear indication that he intended to do so and the inquiry required by N.C. Gen. Stat. § 15A-1242 prior to that date. The record reflects that Defendant did not clearly waive the right to all counsel before March 2019. We hold that the trial court impermissibly allowed Defendant to proceed pro se without such a clear expression of intent and without conducting the proper inquiry prior to trial.

After Defendant was indicted on 9 April 2018, he began filing motions on his own behalf with the trial court from jail. These included two discovery requests, a subpoena request, the aforementioned motion to dismiss for lack of enacting clause and subject matter jurisdiction, and a motion for an audit trail—all filed from April to July 2018.

On 20 August 2018, Defendant’s right to counsel was first addressed. Judge Carpenter informed Defendant of the nature of the charges against him and the range of permissible punishments. Then this exchange occurred:

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[THE COURT]: You have three options in regards to counsel or representation. You can hire your own lawyer, represent yourself or ask me to consider you for court appointed counsel.

[DEFENDANT]: I can speak for myself.

[THE COURT]: Do you want a lawyer to represent you?

[DEFENDANT]: No.

[THE COURT]: [Defendant], I need you to sign a waiver to counsel. [Defendant], you're wanting to waive all rights to counsel? Did I understand you correctly on that? You're not just waiving court appointed counsel, you're waiving all counsel; is that correct?

[DEFENDANT]: I'm not waiving any rights. I'm simply waiving court appointed counsel.

[THE COURT]: So you want to waive court appointed counsel?

[DEFENDANT]: Yes.

[THE COURT]: He's waiving court appointed counsel[.]

While Defendant first seems to categorically disavow legal representation, upon further questioning, Defendant narrows that disavowal to pertain only to court-appointed counsel. Consistent with this, Defendant also executed a written waiver of court-appointed counsel. In an exchange between the prosecutor and Judge Carpenter shortly after this colloquy, the prosecutor stated, "It's my understanding that . . . [Defendant] has requested to hire his own counsel." Judge Carpenter corrected her, stating, "He did not do that. He just waived court appointed counsel." Accordingly, two of the options that the trial court laid out for Defendant remained: "hiring your own lawyer [or] represent[ing] yourself[.]"

Yet, subsequent to this colloquy the trial court operated as though Defendant had fully waived his right to counsel. Judge Carpenter appointed standby counsel for Defendant, which is permissible "[w]hen a defendant has elected to proceed without the assistance of counsel[.]" N.C. Gen. Stat. § 15A-1243 (2019). Then, during the October 2018 session, the trial court allowed Defendant to argue his motion to dismiss for lack of an enacting clause and subject matter jurisdiction without counsel and without any input from standby counsel.

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For the following reasons, Defendant's proceeding pro se here was at odds with the requisite constitutional safeguards.

First, Defendant had to that point never expressed a clear and unequivocal desire to proceed without counsel. Waiving "court-appointed counsel do[es] not amount to [an] expression[] of an intention to represent oneself." *McCrowre*, 312 N.C. at 480, 322 S.E.2d at 777 (citation omitted). In stark contrast to instances where we have found a defendant clearly wished to represent himself, *see, e.g., Whitfield*, 170 N.C. App. at 621, 613 S.E.2d at 291 (The trial court: "Of those three choices, which choice do you make?"; The defendant: "Represent myself."), the 20 August 2018 colloquy left open the possibility of Defendant's retaining counsel. And, while seemingly signaling its understanding that Defendant was proceeding pro se, the trial court's appointment of standby counsel does not mean *Defendant* had clearly and unequivocally expressed such a desire. *See Dunlap*, 318 N.C. at 389, 348 S.E.2d at 805.

Relatedly, these facts do not speak to a knowing, voluntary, and intelligent waiver. While properly advising Defendant of the charges against him, the range of permissible punishments, and his right to counsel, the trial court did not ensure that Defendant understood and appreciated the consequences of proceeding pro se. *See* N.C. Gen. Stat. § 15A-1242(3) (2019). The most concrete means of understanding the deficiencies in Judge Carpenter's colloquy is to compare it with that of Judge Bridges many months later. Not only did Judge Bridges elicit a clear statement from Defendant that he wished to proceed pro se but also he reviewed and ensured that Defendant appreciated the consequences of doing so. *See Bines*, 263 N.C. at 51, 138 S.E.2d at 800 ("Anything less is not waiver.").

We do not gainsay the challenges trial courts face in ensuring compliance with constitutional and statutory rights as they pertain to the right to counsel. But these rights are fundamental, and "[t]his case is a good example of the confusion that can occur when the record lacks a clear indication that a defendant wishes to proceed without representation." *Pena*, 257 N.C. App. at 204, 809 S.E.2d at 6.

As the trial court impermissibly allowed Defendant to proceed pro se without such a clear expression of intent and without conducting the proper inquiry prior to trial, the question then becomes whether the State has proven that the resulting deprivation of Defendant's Sixth Amendment right to counsel was harmless beyond a reasonable doubt. We hold that the State has not met this heavy burden.

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Assuming without deciding that there was no “critical stage” in the litigation prior to the appropriate waiver being obtained in March 2019, the State has not even attempted to argue that the deprivation of counsel was harmless here. “Because the State does not make the required [harmless beyond a reasonable doubt] argument, it has failed in its burden.” *State v. Taylor*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2020 N.C. App. LEXIS 213, at \*137 (2019); *see also Williams*, 2010 N.C. App. LEXIS 22, at \*10 (“[T]he burden is on the State to demonstrate that any error was harmless beyond a reasonable doubt, [] and it is not proper for this Court to carry that burden for the State.”).

And it is hard to see how they could make a plausible argument in these circumstances. Defendant was not without counsel for some mere “housekeeping” matter, *see Veney*, 259 N.C. App. at 924, 823 S.E.2d at 120 (Dietz, J., concurring); during the time period at issue, there was a hearing on the court’s jurisdiction, the possibility of plea negotiations, discovery concerns, and evidentiary issues relating to the preservation of video surveillance, not to mention issues regarding whether Defendant fully understood how the case was progressing as he was proceeding pro se while incarcerated. While Judge Bridges appropriately recognized that Defendant intended to represent himself at trial and accordingly obtained a full waiver of counsel, Defendant had, by that point, been deprived of his right to counsel for the year-long pre-trial period. “We have no way of knowing what counsel for defendant may have found through discovery or if his counsel could have raised valid objections to any of the” State’s evidence. *Hopkins*, 2016 N.C. App. LEXIS 1042, at \*9. After all, “there’s a reason we have folks go to law school for years and take exams to be licensed to do this.” *Schumann*, 257 N.C. App. at 877, 810 S.E.2d at 387. Even assuming we were to believe that the State’s evidence was “quite convincing, we cannot find that the denial of defendant’s right to counsel was harmless beyond a reasonable doubt.” *Hopkins*, 2016 N.C. App. LEXIS 1042, at \*9.<sup>5</sup>

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5. Our Court arrived at the same result using the same reasoning in a circumstance bearing many similarities to the current controversy in the aforementioned *State v. Williams*. In that case, the trial court conducted an imperfect waiver inquiry on 17 August 2006. *Williams*, 2010 N.C. App. LEXIS 22, at \*2. The defendant subsequently argued pre-trial motions pro se on 20 September 2006. *Id.* This was “the only substantive hearing” where the defendant argued pro se before a proper waiver was obtained. *Id.* at \*4. On 3 April 2007, the trial court conducted a thorough colloquy, and the defendant knowingly, voluntarily, and intelligently waived the right to counsel. *Id.* at \*2. The trial began 4 June 2007. *Id.* Despite granting it was “likely that nothing harmful to Defendant’s case transpired during that [20 September 2006] hearing,” our Court held that the State had not proven the error harmless beyond a reasonable doubt and ordered a new trial. *Id.* at \*4. The distinctions between *Williams* and the current controversy, namely the larger amount of time Defendant was denied counsel and the commensurate greater potential consequences thereof, only make it more difficult to prove harmless error.

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## IV. Conclusion

At some point between April and October 2018, Defendant began functioning as his own counsel. The trial court was aware of and, in fact, sanctioned Defendant's actions by assigning Mr. Scales as standby counsel and allowing Defendant to argue a motion without the assistance of counsel. However, Defendant never clearly expressed his desire to proceed *pro se*, and the trial court failed to obtain a proper waiver of all counsel before allowing him to do so. This resulted in a violation of Defendant's Sixth Amendment right to counsel until trial on 12 March 2019, and the violation was not harmless beyond a reasonable doubt.

Defendant is therefore entitled to a new trial.

NEW TRIAL.

Judge COLLINS concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

## I. Summary

Defendant was convicted by a jury of crimes for breaking into and stealing cigarettes from a retail kiosk. Judgment was entered accordingly. The trial court also entered a civil judgment against Defendant for the cost of appointed stand-by counsel, as Defendant proceeded *pro se*.

Defendant makes three arguments on appeal.

He argues that the trial court erred by imposing the civil judgment against him without giving him an opportunity to be here. (The majority does not reach this issue.) I agree and would remand for a new hearing on the civil judgment.

He makes a single argument that the criminal trial *itself* was tainted, contending that the trial court committed plain error by allowing certain evidence in, namely video of him committing the crimes. (The majority does not reach this issue.) I disagree that the trial court committed plain error in this regard. He makes no other argument concerning the trial itself.

Rather, he argues that he is entitled to a new trial, even if no reversible error occurred at the trial itself, because he was allowed to proceed *pro se* during much of the pre-trial stages before being properly advised



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of his right to counsel. Indeed, Defendant represented himself during *all* stages of this proceeding, both pre-trial and trial, and Defendant was not properly advised of his right to counsel until just before the trial was scheduled to begin. There is no dispute, however, that Defendant's constitutional right to counsel was not violated at any point *during the trial itself*, as he knowingly waived his right to counsel before any critical stage of the trial occurred.

I agree that the delay in obtaining a valid waiver of counsel during critical, pre-trial stages was both a constitutional (Sixth Amendment) violation and a violation of a statutory mandate (pursuant to N.C. Gen. Stat. § 15A-1242 (2018)). However, generally such pre-trial violations do not warrant a new trial where the defendant is otherwise afforded a fair trial such that the pre-trial violations do not taint the trial itself.

Regarding the constitutional violation, the majority holds that Defendant is entitled to a new trial because the State failed to meet its burden of showing how any pre-trial, constitutional error was harmless beyond a reasonable doubt. I disagree. I conclude that Defendant failed to meet his initial burden of preserving any constitutional errors for our review. Indeed, the initial burden is on the defendant to preserve constitutional errors for our appellate review. Only regarding those properly preserved constitutional errors does the burden shift to the State to show that the errors were harmless beyond a reasonable doubt.

To the extent that the delay in obtaining a proper waiver was a violation of a *statutory mandate*, I recognize that said violation is automatically preserved. For such errors, the burden is not on the State to show that they were harmless, but is on Defendant to show how he was prejudiced thereby. And, here, Defendant has failed to show how he was prejudiced at trial by any pre-trial violation of a statutory mandate. The evidence at trial was overwhelming against him, none of which was tainted by the pre-trial violation.

To illustrate my point, consider the situation of a defendant involved in a post-indictment line-up in the presence of an identifying witness. Such line-up is, indeed, a "critical stage," where a defendant has the right to have counsel present. *Gilbert v. California*, 388 U.S. 263, 272, 18 L.Ed.2d 1178, 1185 (1967). Our Supreme Court, though, has instructed that the remedy for a Sixth Amendment violation occurring at this stage is not a new trial, but rather the suppression of the testimony of the identifying witness. *State v. Hunt*, 339 N.C. 622, 646-47, 457 S.E.2d 276, 290 (1994). But our Supreme Court has held that if the "defendant's constitutional right of assistance of counsel at the lineup was violated, [the]



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defendant *waive[s] that error* by failing to object when the witness later identify[s] him before the jury as the man he had picked out of the lineup.” *State v. Hunt*, 324 N.C. 343, 355, 378 S.E.2d 754, 761 (1989) (emphasis added). In other words, our Supreme Court held that a defendant does not even have the right to appellate review of a constitutional error where the error is not preserved, without any consideration as to whether or not the error may have been harmless.

Accordingly, my vote is that Defendant received a fair trial, free from reversible error, but that the civil judgment should be vacated and the matter be remanded for a new hearing on the civil judgment.

## II. Background

In March 2018, Defendant was charged with various crimes associated with a break-in of a retail kiosk.

Five months later, on 20 August 2018, well before trial, Defendant appeared in court where he waived his right to *appointed counsel*, though he did not expressly waive his right to counsel generally. The court engaged in a colloquy in which Defendant was informed of his right to counsel, the charges against him, and the possible punishments; however, Defendant was not advised of the consequences of continuing *pro se* at that hearing or in the future. At some point, though, the trial court did appoint stand-by counsel for Defendant.

In March 2019, the matter was called for trial. The presiding judge engaged in the required colloquy with Defendant concerning Defendant’s desire to waive his right to counsel generally, including the consequences of proceeding *pro se*, because he was concerned about the sufficiency of Defendant’s waiver seven months earlier. Defendant formally waived counsel and elected to proceed *pro se*. He did not seek any continuance, indicating that he was ready to proceed with the trial.

During the trial, the State presented overwhelming evidence of Defendant’s guilt. On appeal, Defendant does not point to any objection he made concerning any of the State’s trial evidence. He made no argument during the trial, nor does his appellate counsel make any argument on appeal, that any of the State’s evidence was tainted by any pre-trial, Sixth Amendment error. The State’s evidence offered at trial included a copy of the surveillance video and of photos depicting Defendant committing the break-in. This evidence also consisted of Defendant’s unsolicited admission to the break-in, a statement he made as he was being served the arrest warrant, in which he stated, “Well, the good news is this is the last thing you can pin on me because this is the only other

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thing I did last night.” Defendant makes no argument on appeal concerning the admission of this statement.

Defendant was convicted by the jury for the break-in. The trial court entered judgment accordingly. The trial court also entered a civil judgment against Defendant for the cost associated with his appointed stand-by counsel.

There is nothing in the record, nor does Defendant’s appellate counsel point to anything specifically, where Defendant’s trial itself was affected by him appearing *pro se* during the pre-trial critical stages. Specifically, there is nothing in the record indicating, nor does Defendant’s appellate counsel make any argument, that the State obtained any evidence that might not have been obtained had Defendant been represented during all critical stages. There is nothing in the record indicating, nor does Defendant’s appellate counsel make any argument, that Defendant irretrievably lost, during a pre-trial phase, the right to assert any particular defense at trial.

### III. Analysis

A defendant has a constitutional right to counsel under the Sixth Amendment at every “critical stage” of the proceedings, *which includes many pre-trial proceedings*, as recognized by the United States Supreme Court:

This Court has held that a person accused of a crime “requires the guiding hand of counsel at every step in the proceedings against him,” . . . and that the constitutional principle is not limited to the presence of counsel at trial.

“It is central to that principle that in addition to the counsel’s presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.”

*Coleman v. Alabama*, 399 U.S. 1, 7, 26 L.Ed.2d 387, 395 (1970) (citations omitted). See *State v. Detter*, 298 N.C. 604, 620, 260 S.E.2d 567, 579 (1979) (recognizing this right). Accordingly, it is considered a constitutional error for a trial court to allow a defendant to proceed *pro se* at any critical stage, whether trial or pre-trial, unless the defendant has knowingly waived his right to be represented by counsel.

However, our Supreme Court has repeatedly held that a defendant may not raise a constitutional error for the first time on appeal, where

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“the trial court was denied the opportunity to consider and, if necessary, to correct the error [as it is] well settled that constitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal.” *State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (internal quotation marks omitted) (citation omitted). This rule applies to constitutional issues arising under the Sixth Amendment. *See State v. Valentine*, 357 N.C. 512, 525, 857, 591 S.E.2d 846, 857 (2003) (holding that defendant waived Sixth Amendment issue by failing to raise the issue at trial); *see also State v. Hunt*, 324 N.C. at 355, 378 S.E.2d at 761 (1989) (holding that “[a]ssuming arguendo that defendant’s constitutional right of assistance of counsel at the lineup was violated, defendant waived that error by failing to object when the witness later identified him before the jury as the man he had picked out of the lineup”).

And this rule applies to Sixth Amendment issues occurring during critical, pre-trial proceedings. *See id.* at 355, 378 S.E.2d at 761 (1989) (defendant waived Sixth Amendment “right to counsel” argument for error occurring during a post-indictment lineup); *see also State v. Gibbs*, 335 N.C. 1, 42, 436 S.E.2d 321, 344 (waived Sixth Amendment “right to counsel” argument for error occurring during interrogation by law enforcement).

Here, Defendant’s appellate counsel does not point to anything that occurred at trial that was tainted by a pre-trial, constitutional error, whether preserved or unpreserved. Rather, his counsel only speculates that the pre-trial error of allowing Defendant to proceed *pro se* before being properly advised cost Defendant opportunities to “develop[] evidence, negotiate[] a plea, or fil[e] significant pretrial motions.” However, this argument ignores the fact that *after* Defendant was properly advised of his rights before the trial started, he had the opportunity to bring to the trial court’s attention that he needed a continuance to allow time to develop evidence, to negotiate a plea deal, or to file pretrial motions and that his trial would otherwise not be fair if he was not granted this opportunity. In other words, Defendant, after being properly advised, did not bring to the trial court’s attention how any pre-trial error might infect the trial itself and, otherwise, did not give the trial court the opportunity to correct such error. For example, once properly advised, he had the opportunity to ask the trial court for a continuance, to allow him more time, if he thought there was a real problem. He did not do so; therefore, he cannot now complain and get a new trial.

And as Defendant refused counsel and decided to proceed *pro se* even after being properly advised of the risks of doing so, he assumed

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the risk. Thus, we must analyze this appeal in the same way we would had he invoked his right to counsel and been fully represented once being properly advised. A trial attorney has the obligation to point out constitutional errors to the trial court to preserve the issue for appellate review. In the same way, a defendant proceeding *pro se*, after being properly advised, has the same obligation.

In conclusion, Defendant has failed to preserve any constitutional errors associated with Sixth Amendment violations which occurred pre-trial for appellate review.<sup>1</sup>

I agree, though, that a violation of a statutory mandate, is generally preserved, even without an objection being lodged at trial. *State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (stating that “[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved notwithstanding defendant’s failure to object at trial”). However, where there is a violation of a statutory mandate, the burden is on the defendant to show prejudice. And to the extent that the delay in properly advising Defendant of his right to counsel in this proceeding constitutes a violation of a statutory mandate, Defendant has failed to show how he was prejudiced at trial by this violation. It is important to note that the statutory mandate was not violated during the trial itself, as Defendant was properly advised under N.C. Gen Stat. § 15A-1242 before the trial began. Further, the evidence against Defendant at trial was overwhelming, evidence which included a video of him committing the break-in and his admission to the break-in. Defendant makes no argument on appeal that any evidence was tainted by the delay in properly advising

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1. Had Defendant preserved an argument for review, I am convinced from the record that any error was harmless beyond a reasonable doubt, based on the overwhelming evidence against Defendant and the lack of anything in the record tending to show that the trial was tainted by the pre-trial error. But I am cognizant of case law from our Court which holds that the State’s failure to make any “harmless error” argument waives our consideration of harmless error, notwithstanding that the record itself may demonstrate that any error was, indeed, harmless. *See State v. Taylor*, 2020 N.C. App. LEXIS 213, 137 (2020). *See also In re L.I.*, 205 N.C. App. 155, 162, 695 S.E.2d 793, 799 (2010) (holding the same as *Taylor*). An argument could be made, though, that waiver does not apply: the State is the appellee and has no duty to file a brief, and the State’s burden is met simply if the record shows that the error was harmless, notwithstanding that the State failed to make any argument in a brief that the error was harmless. Our Supreme Court had the opportunity to take up the issue as to whether the State, as appellee, can waive “harmless error” review by failing to make an argument, but declined to do so. *See State v. Miller*, 371 N.C. 273, 280, 814 S.E.2d 93, 98 (2018) (recognizing the issue, but, as stated in footnote 5, declining to decide the issue).

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Defendant of his right to counsel. Finally, any conclusion that the violation of the statutory mandate is prejudicial *per se* would lead to absurd results. That is, if it was considered prejudicial *per se* in every case that a defendant is allowed to proceed unrepresented during some initial, pre-trial stage, then it would be impossible to successfully prosecute such defendant – no matter how fair the trial was and no matter that all tainted evidence may have been suppressed – as any conviction would have to be reversed.

Turning to Defendant's other arguments not reached by the majority, Defendant contends that certain photos and a copy of the surveillance video showing him breaking into the kiosk should not have been admitted at trial. He did not object to the admission of this evidence at trial, after he had been properly advised of the consequences of not being represented by counsel. I believe the evidence was admissible for the reasons stated in the State's brief. But even assuming that the evidence was inadmissible, I do not believe that the trial court committed error by not intervening *ex mero motu* when the evidence was introduced or that the admission of said evidence constituted plain error.

Regarding the civil judgment, Defendant contends that he was deprived of his right to be heard before the trial court entered the civil judgment against him for the fees of the appointed stand-by counsel. The State essentially concedes this error, and I agree. I would vacate that civil judgment and remand the matter for the limited purpose of holding a hearing on this civil issue.

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[271 N.C. App. 140 (2020)]

STATE OF NORTH CAROLINA

v.

JAMES LLOYD MONEY, DEFENDANT

No. COA19-1043

Filed 21 April 2020

**1. Motor Vehicles—operating a motor vehicle while displaying an expired registration plate—sufficiency of evidence**

The trial court improperly denied defendant's motion to dismiss a charge of operating a motor vehicle while displaying an expired registration plate (N.C.G.S. § 20-111(2)) because the State's evidence showed that an officer stopped defendant's car for not displaying a registration plate at all.

**2. Appeal and Error—preservation of issues—argument challenging sufficiency of evidence—truly an objection to jury instruction**

In a prosecution for operating a vehicle without a current inspection certificate (N.C.G.S. § 20-183.8(a)(1)), the Court of Appeals declined to review defendant's argument that the trial court improperly denied his motion to dismiss the charge for insufficiency of the evidence where the court's jury instructions required proof that he willfully displayed an expired certificate but where the evidence showed he did not display any certificate. Because the trial court's instructions required proof of an unnecessary element, the Court of Appeals classified defendant's argument as challenging an erroneous jury instruction; thus, defendant's motion to dismiss did not preserve his argument for appellate review, and defendant otherwise failed to preserve it by neither objecting to the instructions at trial nor asserting plain error on appeal.

**3. Sentencing—prison sentence—based on two misdemeanors and an infraction—unauthorized by law**

In a prosecution for various driving-related offenses, where defendant was sentenced to ten days' imprisonment suspended upon twelve months of supervised probation, the sentence was reversed and remanded on appeal because defendant had no prior convictions, was convicted of two Class 3 misdemeanors and one infraction, and therefore should have received a sentence imposing only court costs and a fine (pursuant to N.C.G.S. § 15A-1340.23(d)).

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Appeal by Defendant from judgment entered 24 April 2019 by Judge Carl R. Fox in Forsyth County Superior Court. Heard in the Court of Appeals 1 April 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Neil Dalton, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant.*

BROOK, Judge.

James Lloyd Money (“Defendant”) appeals from judgment entered upon jury verdicts for driving while license revoked, operating a vehicle while displaying an expired registration plate, and operating a vehicle without an approved inspection certificate. Defendant argues that the trial court erred in denying his motion to dismiss because the evidence presented at trial did not support the charges of operating a motor vehicle while displaying an expired registration plate and operating a motor vehicle without an approved inspection certificate. Defendant further argues that his sentence was not authorized by law.

For the following reasons, we agree with Defendant that the trial court erred in denying his motion to dismiss the charge of operating a motor vehicle while displaying an expired registration plate but hold the trial court properly denied Defendant’s motion to dismiss the charge of operating a vehicle without an approved inspection certificate. We further hold that the trial court erred in its sentencing of Defendant.

### I. Factual and Procedural Background

On 27 April 2018, Kernersville Police Officer Sawyer Highfill stopped Defendant because he was driving his pickup truck without a license plate. Defendant provided Officer Highfill with an insurance card and the truck’s Vehicular Identification Number (“VIN”) number and told Officer Highfill that he “was not required to” produce a driver’s license. Officer Highfill entered the truck’s VIN number into the police database and determined that the truck was registered to Defendant, but the registration and inspection were expired. Officer Highfill also determined that Defendant’s license was revoked.

Officer Highfill issued two citations. The first, bearing file number 2018CR 712745, alleged that Defendant did unlawfully and willfully:

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(1) operate a motor vehicle on a street or highway while the Defendant's driver's license was revoked. (G.S. 20-28(A)).

(2) operate a motor vehicle on a street or highway without displaying thereon a current approved inspection certificate, such vehicle requiring inspection in North Carolina. Month Expired 03/2015. (G.S. 20-183.8(A)(1)).

The second, with file number 2018CR 712746, alleged that Defendant did unlawfully and willfully

operate a motor vehicle on a street or highway while displaying an expired registration plate on the vehicle knowing the same to be expired. (G.S. 20-111(2)).

Defendant was tried in district court on 17 October 2018 and found guilty of the offenses. Defendant appealed to superior court.

On 23 April 2019, Defendant represented himself in a jury trial before Judge Fox in Forsyth County Superior Court. At trial, Defendant testified in his defense that he did not have a driver's license because, based on his legal research, he concluded that driver's licenses were only required for commercial vehicles, and he drove his vehicle for personal use. He testified that he "probably" made a conscious decision to remove the registration plate from his truck several years prior to 27 April 2018 after conducting legal research that led him to believe that registration plates were only required for commercial vehicles. At the close of the State's evidence and at the close of all evidence, Defendant made a motion to dismiss for "lack of evidence," which the trial court denied.

During closing arguments, Defendant argued that for the charge of driving while license revoked, he did not "have a driver's license to actually be suspended in the first place[,] and "[i]t's kind of hard to suspend something you don't have." As to the charge of operating a motor vehicle without an approved inspection certificate, Defendant argued that he maintained his vehicle himself and ensured that it was safe. Finally, as to the charge of operating a motor vehicle while displaying an expired registration plate, Defendant argued, "[T]here's no plate on there to actually be expired in the first place. It's not there."

The jury found Defendant guilty of driving while license revoked, a Class 3 misdemeanor, and operating a motor vehicle while displaying an expired registration plate, a Class 3 misdemeanor. The jury found Defendant responsible for operating a motor vehicle without an approved inspection certificate. Judge Fox indicated on the judgment



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form that Defendant was a prior record level I with zero prior convictions and sentenced Defendant to 10 days' imprisonment, suspended upon 12 months of unsupervised probation. Judge Fox imposed court costs and a fine in the amount of \$662.50.

Defendant timely noticed appeal.

**II. Analysis**

On appeal, Defendant argues that the trial court erred in denying his motion to dismiss the charges of operating a vehicle while displaying an expired registration plate and operating a vehicle without an approved inspection certificate because there was no evidence that he "displayed" a plate, tag, or certificate. Defendant further argues that the trial court entered a sentence that was not authorized by law since he was only convicted of two Class 3 misdemeanors and an infraction and had no prior convictions.

The State concedes that the trial court erred in denying Defendant's motion to dismiss the charge of operating a vehicle while displaying an expired registration plate and in imposing a sentence of 10 days' imprisonment suspended upon 12 months of unsupervised probation, and we agree. As to Defendant's remaining argument on appeal, that the trial court erred in denying his motion to dismiss the charge of operating a motor vehicle without displaying an approved inspection certificate, we hold that the trial court properly denied Defendant's motion.

**A. Standard of Review**

"This Court reviews a trial court's denial of a motion to dismiss *de novo*." *State v. Stroud*, 252 N.C. App. 200, 208, 797 S.E.2d 34, 41 (2017). The question of whether the sentence imposed was authorized by the jury's verdict is also reviewed *de novo*. *State v. Lail*, 251 N.C. App. 463, 471, 795 S.E.2d 401, 408 (2016). "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted).

**B. Motion to Dismiss**

A defendant properly preserves an insufficiency of the evidence argument for review if he makes a motion to dismiss based on insufficient evidence at the close of the State's evidence and renews that motion at the close of all evidence. N.C. R. App. P. 10(a)(1), (3); *see also State v. Golder*, \_\_ N.C. \_\_, \_\_, \_\_ S.E.2d \_\_, \_\_, 2020 N.C. LEXIS 271 \*13 (2020) ("[A] defendant's motion to dismiss preserves all issues related to the sufficiency of the State's evidence for appellate review.").

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A general motion to dismiss for insufficient evidence preserves a defendant's arguments on all elements of all charged offenses, even if the defendant proceeds to specifically argue about fewer than all of the elements or charges to the trial court. *State v. Pender*, 243 N.C. App. 142, 152-53, 776 S.E.2d 352, 360 (2015).

"Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

We note that Defendant has properly preserved his arguments for our review since he renewed his general motion to dismiss "based on lack of evidence" at the close of all evidence. *See State v. Mueller*, 184 N.C. App. 553, 559, 647 S.E.2d 440, 446 (2007) (holding that the defendant's general motion to dismiss based on insufficient evidence, which was renewed after the defendant presented evidence, was sufficient to preserve insufficient evidence arguments as to all of his charges even though he only made arguments as to some of his charges at trial). We therefore proceed to the merits of Defendant's claims.

i. Operating a Motor Vehicle While Displaying an Expired  
Registration Plate

**[1]** Defendant was cited for "operat[ing] a motor vehicle on a street or highway while displaying an expired registration plate on the vehicle knowing the same to be expired. (G.S. § 20-111(2))." Under N.C. Gen. Stat. § 20-111(2), it is a Class 3 misdemeanor

[t]o display or cause or permit to be displayed or to have in possession any registration card, certificate of title or registration number plate knowing the same to be fictitious or to have been canceled, revoked, suspended or altered, or to willfully display an expired license or registration plate on a vehicle knowing the same to be expired.

N.C. Gen. Stat. § 20-111(2) (2019).

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Even viewed in the light most favorable to the State, no substantial evidence shows Defendant “display[ed] an expired registration plate on a vehicle.” *Id.* In fact, Officer Highfill testified that he stopped Defendant’s car because there was “no license plate on it.” Defendant also testified that he removed the plate “years ago.”

Though the State’s evidence would have supported a conviction under N.C. Gen. Stat. § 20-111(1), which makes it a Class 3 misdemeanor to drive a vehicle without a current registration plate or a vehicle that is not registered, the evidence presented at trial did not support the charged offense. Therefore, Defendant’s motion to dismiss should have been granted.

ii. Operating a Motor Vehicle Without an Approved Inspection Certificate

[2] Defendant was also cited for “operat[ing] a motor vehicle on a street or highway without displaying thereon a current approved inspection certificate, such vehicle requiring inspection in North Carolina. Month expired 03/2015. (G.S. 20-183.8(A)(1)).” Under N.C. Gen. Stat. § 20-183.8(a)(1), it is an infraction for a person to

[o]perate[] a motor vehicle that is subject to inspection under this Part on a highway or public vehicular area in the State when the vehicle has not been inspected in accordance with this Part, as evidenced by the vehicle’s lack of a current electronic inspection authorization or otherwise.

N.C. Gen. Stat. § 20-183.8(a)(1) (2019).

The trial court instructed the jury on this infraction as follows:

The defendant has been charged with willfully *displaying* an expired inspection certificate on a vehicle knowing the same to be expired.

For you to find [Defendant] responsible of this offense, the State must prove two things beyond a reasonable doubt.

First, that the defendant willfully *displayed* an expired inspection certificate on a vehicle.

And second, that the defendant knew that the inspection certificate was expired.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant

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willfully *displayed* an expired inspection certificate on a vehicle and that the defendant knew that the inspection certificate was expired, it would be your duty to return a verdict of responsible. If you do not so find or have a reasonable doubt as to one or more of these things, then it would be your duty to return a verdict of not responsible.

(Emphasis added.)

Defendant argues that the evidence was insufficient to support his conviction. Specifically, he contends that the jury was instructed on a theory of guilt that required the “display” of an expired inspection certificate and that “a defendant may not be convicted of an offense on a theory of his guilt different from that presented to the jury.” *State v. Smith*, 65 N.C. App. 770, 773, 310 S.E.2d 115, 117 (1984). For the reasons stated below, Defendant’s argument is properly classified as a challenge to an erroneous jury instruction, and that argument is not properly preserved for our review.

“The Due Process Clause of the United States Constitution requires that the sufficiency of the evidence to support a conviction be reviewed with respect to the theory of guilt upon which the jury was instructed.” *State v. Wilson*, 345 N.C. 119, 123, 478 S.E.2d 507, 510 (1996) (citing *Presnell v. Georgia*, 439 U.S. 14, 16, 99 S. Ct. 235, 236-37, 58 L. Ed. 2d 207, 211 (1978)), *abrogated on other grounds by State v. Millsaps*, 356 N.C. 556, 568, 572 S.E.2d 767, 775 (2002). This well founded principle arises out of cases where “there could be evidence in the record indicating culpability for more than one theory” of the crime. *State v. Vines*, \_\_\_ N.C. App. \_\_\_, 829 S.E.2d 701, 2019 WL 3202226, at \*4 (2019) (unpublished). In such instances, “the evidence supporting the conviction can only be reviewed according to the theory or theories on which the jury was instructed at trial.” *Id.* “For example, a conviction for felony larceny may not be based on the value of the thing taken when the trial court has instructed the jury only on larceny pursuant to burglarious entry.” *Smith*, 65 N.C. App. at 773, 310 S.E.2d at 117. Or if a defendant is charged with first-degree murder under the principle of acting in concert, “the conviction cannot be upheld absent a jury charge to that effect.” *Wilson*, 345 N.C. at 123-24, 478 S.E.2d at 511 (“[A]bsent an acting in concert instruction, it was necessary for the State to prove each element of first-degree murder on the theory of premeditation and deliberation[.]”).

This case, unlike those cited above, is not one where there were alternate theories of guilt that could have been submitted to the jury to find Defendant responsible for driving without an approved inspection certificate. There was one route to the State’s end: it had to prove

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beyond a reasonable doubt that Defendant (1) was operating a motor vehicle (2) without an approved inspection certificate. *See* N.C. Gen. Stat. § 20-183.8(a)(1) (2019). Though displaying an expired inspection certificate is one potential form of *evidence* the State could use in an effort to establish the offense at issue, it is not a necessary *element*. *Id.* Rather than allowing a conviction via a different theory of the offense, the instructions in this case “required the State to prove an element that was not required by the charging statute[.]” *State v. Dale*, 245 N.C. App. 497, 506, 783 S.E.2d 222, 228 (2016). *Presnell* and its progeny do not stand for the proposition that an erroneous jury instruction can increase “the State’s evidentiary burden to prove the commission of a crime *beyond* its necessary elements.” *Vines*, 2019 WL 3202226, at \*5 (emphasis in original).

Accordingly, Defendant’s argument is best characterized as a challenge to an erroneous jury instruction. But Defendant did not object to the jury instruction, N.C. R. App. P. 10(a)(2), nor does he allege plain error review is warranted in his brief, N.C. R. App. P. 10(a)(4).<sup>1</sup> Therefore, we cannot properly review an error in the trial court’s instruction to the jury.

## C. Defendant’s Sentence

[3] Defendant next argues that the trial court erred in entering a sentence of 10 days’ imprisonment suspended upon 12 months of unsupervised probation because such a sentence was not authorized by law.<sup>2</sup>

“[A]n argument that the sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law may be reviewed on appeal even without a specific objection before the trial court.” *State v. Mumford*, 364 N.C. 394, 403, 699 S.E.2d 911, 917 (2010) (internal marks omitted).

Under N.C. Gen. Stat. § 15A-1340.23(d), a court is authorized to enter judgment imposing only court costs and a fine against a defendant

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1. Plain error exists when “the error had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations and marks omitted). An erroneous jury instruction suggesting the State had a *higher* burden of proof is, at the very least, difficult to square with any notion of prejudice to Defendant. *See Dale*, 245 N.C. App. at 507, 783 S.E.2d at 229 (same).

2. Although we have determined that the trial court erred in denying Defendant’s motion to dismiss one of his charges, we elect to review his remaining argument because the same issue may arise on remand.

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who is convicted of a Class 3 misdemeanor unless the specific offense provides otherwise or the defendant has more than three prior convictions. N.C. Gen. Stat. § 15A-1340.23(d) (2019).

Here, the judgment sheet notes that Defendant did not have any prior convictions. Though Defendant was convicted of two Class 3 misdemeanors and one infraction and should have received a sentence of court costs and a fine only, *see id.*, the trial court imposed a sentence of 10 days' imprisonment, suspended upon 12 months of unsupervised probation. Such a sentence was not authorized by law.

**III. Conclusion**

For the above stated reasons, we hold that the trial court erred in denying Defendant's motion to dismiss for operating a motor vehicle while displaying an expired registration plate but hold that it properly denied Defendant's motion to dismiss for operating a motor vehicle without an approved inspection certificate.

On remand, Defendant is entitled to be re-sentenced consistent with this opinion.

**NO ERROR IN PART; REVERSED IN PART AND REMANDED.**

Judges TYSON and ZACHARY concur.

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STATE OF NORTH CAROLINA

v.

KENNETH CHRISTOPHER STALLINGS, DEFENDANT

No. COA19-636

Filed 21 April 2020

**1. Jurisdiction—bill of information—timing of filing—waiver of indictment—lack of arraignment**

In a drug trafficking case, the trial court had subject matter jurisdiction to proceed on a superseding bill of information filed after the judge's address to the jury venire but before jury selection, because the plain language of N.C.G.S. § 15A-646 did not require the State to file a superseding bill of information before trial. Further, defendant waived indictment and the information was proper in form. The lack of formal arraignment on the new charge (which

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corrected the type of drug at issue) was not reversible error where defendant did not object and had notice of the charge.

**2. Drugs—jury instructions—guilty knowledge—plain error analysis**

The trial court did not commit plain error by failing to sua sponte give a jury instruction on guilty knowledge (regarding knowledge of the specific illegal substance at issue). Rather than contending he did not know the nature of the methamphetamine found in his home, defendant instead contended he had no knowledge of the presence of the methamphetamine and that it belonged to someone else. Even if error, the failure to instruct on guilty knowledge did not rise to plain error where the State presented copious evidence defendant was the only occupant of the home where the drugs were found.

Appeal by Defendant from judgment entered 10 January 2019 by Judge William A. Wood, II, in Guilford County Superior Court. Heard in the Court of Appeals 18 February 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Benjamin T. Spangler, for the State.*

*Daniel J. Dolan, for Defendant Appellant.*

INMAN, Judge.

Defendant Kenneth Christopher Stallings (“Defendant”) appeals from a judgment entered following a jury verdict finding him guilty of possession with intent to sell or deliver marijuana, possession of marijuana drug paraphernalia, and trafficking in methamphetamine. On appeal, Defendant contends that the trial court: (1) lacked subject matter jurisdiction to try him on the charge of trafficking in methamphetamine because the relevant charging document—an information superseding an earlier indictment—was not filed prior to trial; and (2) committed plain error in failing to give a jury instruction on guilty knowledge *sua sponte*. After careful review, we hold that Defendant has failed to demonstrate reversible error.

**I. FACTUAL AND PROCEDURAL HISTORY**

The evidence at trial tends to show the following:

On the afternoon of 19 September 2017, Officer Senaria Smith of the Greensboro Police Department responded to a call from a security

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company about a possible break-in at a house on Gatewood Avenue. When she arrived at the home, she heard a noise from inside and noticed that the side door had been forced open. Concerned that a person could still be in the home, Officer Smith drew her sidearm and called for backup.

Additional officers arrived a short time later and conducted a protective sweep of the house. In the course of the sweep, Officer Smith observed a scale and narcotics on the kitchen counter, a plastic bag with a crystalline substance on the floor, and a hole in the laundry room wall with plastic baggies inside.

Defendant arrived at the house as police were leaving. Officer Smith asked him if he lived there. Defendant replied that he did and stated that he had a roommate named “Michael—uh—Smith.”

Police informed Defendant that officers had found evidence of narcotics in plain view during their protective sweep. Defendant responded by asking, “More than weed?” When the officers described the additional narcotics, Defendant said, “I don’t know about all that.” He then told police that he was trying to call Michael Smith.

Defendant cooperated with police and signed a form consenting to a search of the home. In the bedroom Defendant identified as his roommate’s, Officer Smith found a stack of paperwork bearing only Defendant’s name. A Greensboro drug and vice detective, Harvey Harris, arrived a short time later to assist Officer Smith. Detective Harris observed two substances—one crystalline and the other consistent with marijuana—on the scale on the kitchen counter. Next to the scale, Detective Harris saw a bag containing a crystalline substance inside a pill bottle bearing Defendant’s name. He also observed plastic bags, including a bag of marijuana, nearby, as well as a marijuana cigarette in the ashtray of the living room. Searches by other officers turned up another bag of marijuana in a bedroom. Detective Harris also located the plastic bag that Officer Smith had seen on the floor of the laundry room and noticed it contained a crystalline substance.

Detective Harris asked Defendant who lived there. Defendant confirmed that his name was on the lease and utility bills. Detective Harris further questioned Defendant about the crystalline substances which appeared to be methamphetamine, and Defendant said he and Michael Smith both stayed there. Detective Harris asked Defendant for a picture of Michael Smith, which he was unable to provide. Defendant stated that Michael Smith’s phone had been cut off, and that he did not know any of his roommate’s friends or relatives. He



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denied dealing in methamphetamines or any illegal narcotics but admitted to smoking marijuana.

Asked to identify items in the house belonging to his roommate, Defendant was unable to specifically identify anything other than a green toothbrush with a travel cap located in the bathroom. The officers concluded their search of the house after recovering the following items: (1) the plastic bag from the laundry room floor, which contained methamphetamine; (2) the clear plastic bags in a cut out area of the laundry room wall; (3) the digital scale with marijuana and a crystalline substance; (4) the pill bottle with Defendant's name on it and a bag of methamphetamine inside; (5) the bag of marijuana and a box of plastic bags on the kitchen counter; (6) the marijuana roach in the living room; (7) a bag of marijuana from one of the bedrooms; (8) \$1,247 in cash in a bedroom closet; (9) the paperwork with Defendant's name on it; (10) Defendant's phone; (11) an additional iPhone from one of the bedrooms; and (12) a tablet computer that Defendant claimed as his. Defendant was taken into custody following the search, and Officer Smith and Detective Harris both recorded the above events with body cameras.

Following Defendant's arrest, police searched Defendant's phone and discovered text messages that indicated Defendant sold marijuana. Lab reports later confirmed that the substance found in the plastic bag in the laundry room was methamphetamine. Officers continued to monitor Defendant's home for two weeks following the break-in in an attempt to locate and identify Michael Smith; those efforts ultimately proved unsuccessful, and no person named "Michael Smith" was ever located.

A Guilford County grand jury returned two indictments on 19 February 2018. The first indictment, filed in file number 17 CRS 86100, charged Defendant with one count each of trafficking in MDMA and maintaining a dwelling for keeping and selling MDMA; the second indictment, filed in file number 17 CRS 86101, charged him with one count of possession with intent to sell marijuana and one count of possession of marijuana paraphernalia. Both cases came on for trial on 7 January 2019 and were consolidated at the outset of proceedings.

The trial court called in prospective jurors and questioned them about any undue hardships warranting deferral of jury service. It next informed the venire of the charges brought against Defendant, the date of the alleged offenses, and Defendant's plea of not guilty. The trial court sat twelve potential jurors in the jury box and asked if they had any connection with the judge, the attorneys, Defendant, and any potential witnesses. It then turned the *voir dire* questioning over to the State, but the prosecutor instead requested a bench conference. The trial court

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excused the venire, at which point the prosecutor pointed out that the allegations in the indictment in file number 17 CRS 86100 concerned MDMA rather than the methamphetamine ultimately shown on the lab reports:

[THE STATE]: [T]he substance in the lab report is methamphetamine. It is not 3, 4-MDMA, which is what was identified.

....

Now, at this point, we have two choices: I can dismiss that charge, because we have not impaneled a jury, and I can reindict and [have] Mr. Stallings go through the arrest process again, or I — or we can do it on a bill of information. However, Your Honor knows and his attorney knows, that's totally up to Mr. Stallings at this point.

....

[DEFENDANT'S COUNSEL]: Like [the prosecutor] . . . I have been prepping this thing about a month, and I read that twice as well, several times. And it is what it is. I would like an opportunity just to step back in the conference room and talk to my client with regard to the options in the case. I think the options that [the prosecutor] stated in open court are accurate.

THE COURT: [Defendant's counsel], you take all the time you need.

Over an hour later, the parties returned to the courtroom and proceedings resumed. Defendant's counsel informed the Court that, after discussing their options and "the risks and benefits of both the bill of information and a delay," Defendant agreed to proceed by information charging him with trafficking methamphetamine and had signed a waiver of indictment and statutory notice normally required for the new charge. The trial court pointed out that it had previously denied Defendant's pre-trial motion for a continuance and recusal and noted that Defendant would essentially receive that relief if he decided against waiving reindictment. Defendant's counsel confirmed on the record that his client nonetheless wished to proceed on the information. Consistent with that understanding, the prosecutor read into the record the allegations in the new bill of information—charging Defendant with only one count of trafficking methamphetamine—and informed the court that "at the same time, I'll be filing a dismissal in the MDMA [indictment]."

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With the new information in hand, the trial court called the prospective jurors back into the room and informed them of the new charge. Following jury selection, the jury was empaneled, and the trial proceeded in ordinary fashion. Officer Smith and Detective Harris both testified to their experiences with Defendant on the day of the break-in, and the footage from their body cameras was submitted into evidence during the State's presentation. Defendant did not testify in his defense, but he did call a man named Tyrone Brown as a witness. Mr. Brown testified that he: (1) was the roommate that lived in the house with Defendant; (2) had brought the methamphetamine into the house without Defendant's knowledge; and (3) hid the methamphetamine in the laundry room and pill bottle. When asked what room he stayed in, Mr. Brown testified "all of them[,] and testified that he kept clothes in closets in both rooms.

After the close of evidence and during the jury charge, the trial court gave the standard instruction on narcotics trafficking, which did not include any specific instruction on guilty knowledge. The jury ultimately convicted Defendant on all counts. Defendant now appeals.

**II. ANALYSIS***A. Standards of Review*

Defendant presents two arguments on appeal, contending that the trial court: (1) lacked subject matter jurisdiction to convict him of the trafficking charge given the procedural timing of the filed information; and (2) committed plain error in failing to give the jury additional instruction on the guilty knowledge element of that same crime. Each is subject to a different standard of review on appeal.

We review subject matter jurisdiction *de novo*. *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012). To the extent our jurisdictional analysis requires statutory interpretation, that too is a question of law subject to *de novo* review. *Lassiter v. N.C. Baptist Hosps., Inc.*, 368 N.C. 367, \_\_\_, 778 S.E.2d 68, 73 (2015).

Plain error review of the trial court's jury instruction requires Defendant to show error that "had a probable impact on the jury's finding of guilt." *State v. Odom*, 307 N.C. 655, 661, 300 S.E.2d 375, 378-79 (1983). Such error must be "a fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Gregory*, 342 N.C. 580, 586, 467 S.E.2d 28, 32 (1996).

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*B. Subject Matter Jurisdiction and the Information*

**[1]** Defendant argues that a superseding information must be filed prior to trial, and the State's failure to do so in this case deprived Defendant of his constitutional right to prosecution by indictment—his written waiver of that right notwithstanding.<sup>1</sup> Based on the plain language of the statute Defendant relies on for this argument, we disagree.

Defendant points to N.C. Gen. Stat. § 15A-646 (2019), which provides in pertinent part:

If at any time before entry of a plea of guilty to an indictment or information, or commencement of a trial thereof, another indictment or information is filed in the same court charging the defendant with an offense charged or attempted to be charged in the first instrument, the first one is, with respect to the offense, superseded by the second and, upon the defendant's arraignment upon the second indictment or information, the count of the first instrument charging the offense must be dismissed by the superior court judge.

Defendant construes the statute to mean that the State can file a superseding information only "before entry of a plea of guilty to an indictment or information[.]" *id.*, and the State's failure to do so nullifies the information, as well as Defendant's waiver of the constitutional right to prosecution by indictment, while depriving the trial court of subject matter jurisdiction over the charge.<sup>2</sup>

Defendant's interpretation is unsupported by the plain language of the statute. Absent any ambiguity, an absurd result, or an outcome that contravenes a statute's expressed purpose,<sup>3</sup> we are duty-bound to give effect to that plain language. *State v. Curtis*, 371 N.C. 355, 358, 817 S.E.2d 187, 189 (2018).

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1. Defendant does not argue that the initial indictment or superseding information is facially invalid in any other respect.

2. We note that a plea of guilty may be entered before or after trial has begun. *See, e.g., State v. Paige*, 180 N.C. App. 693, 639 S.E.2d 143, 2006 WL 3717551 (2006) (unpublished) (affirming a trial court's order denying a defendant's motion to withdraw a guilty plea that was entered during the State's presentation of evidence); *State v. Moody*, 345 N.C. 563, 481 S.E.2d 629 (1997) (holding no error on appeal from a trial in which the defendant pled guilty to first-degree murder during trial and after the State had presented testimony from multiple witnesses).

3. Defendant does not argue any of these positions on appeal.

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Our Supreme Court has previously held that N.C. Gen. Stat. § 15A-646 merely requires the trial court to perform the “ministerial act” of dismissing an initial charging document when a superseding indictment or information is filed before trial or the entry of a guilty plea. *State v. Carson*, 320 N.C. 328, 333, 357 S.E.2d 662, 666 (1987). The statute imposes a positive duty *on the trial court*, not the State. This is in contrast to other statutes in which the General Assembly has expressly required the State to file charging documents by a particular stage of proceedings. *See* N.C. Gen. Stat. § 15A-922(d) (2019) (requiring the State to file a statement of charges upon determination of a prosecutor “*prior to arraignment in the district court*” (emphasis added)); *State v. Wall*, 235 N.C. App. 196, 200, 760 S.E.2d 386, 388 (2014) (holding the State’s failure to file its statement of charges consistent with the timing requirement in N.C. Gen. Stat. § 15A-922(d) deprived the trial court of jurisdiction); *State v. Allen*, 292 N.C. 431, 433-34, 233 S.E.2d 585, 587 (1977) (holding that an habitual felon indictment must be brought prior to full prosecution of the underlying substantive felony consistent with the statutory procedures established by the Habitual Felons Act).

Previous decisions by this Court suggest that such a timing requirement does not exist when there is a proper waiver of prosecution by indictment. *See, e.g., State v. Wilson*, 128 N.C. App. 688, 497 S.E.2d 416 (1998) (holding a defendant could appeal question of subject matter jurisdiction over an unindicted charge presented to the jury—even though defendant himself requested instruction on the crime at the charge conference—because defendant had *not* waived indictment under N.C. Gen. Stat. § 15A-642(c)).

We also disagree with Defendant’s argument that his constitutional right to prosecution by indictment has been violated. Article I, Section 22 of the Constitution of North Carolina provides that “[e]xcept in misdemeanor cases initiated in the District Court Division, no person shall be put to answer any criminal charge but by indictment, presentment, or impeachment.” That section also states, however, that “any person, when represented by counsel, may, under such regulations as the General Assembly shall prescribe, waive indictment in noncapital cases.” *Id.* Under our statutes, such a waiver is accomplished if it is “in writing and signed by the defendant and his attorney” and “attached to or executed upon the bill of information.” N.C. Gen. Stat. § 15A-642(c) (2019). Here, Defendant’s waiver complies with the constitutional and statutory requirements for waiving prosecution by indictment, as he was represented by counsel and executed a written waiver on the superseding bill of information. While Defendant now protests that he was never made aware that he was waiving “his right to have a superseding information

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tinely filed” and thus did not knowingly, voluntarily, and intelligently waive prosecution by indictment, he identifies no constitutional provision requiring the pre-trial filing of a superseding information.

Because we hold that N.C. Gen. Stat. § 15A-646 does not require the State to file a superseding information before trial in order to retain the trial court’s subject matter jurisdiction, we do not reach Defendant’s argument that a trial begins for purposes of the statute at or around the time the trial judge first addresses the venire.<sup>4</sup>

Defendant also suggests that the trial court had no subject matter jurisdiction because he was not formally arraigned on the new charge.<sup>5</sup> But, as pointed out by the State, the lack of formal arraignment does not constitute reversible error when the defendant does not object and assert inadequate notice of the charge. *See, e.g., State v. Brown*, 306 N.C. 151, 174, 293 S.E.2d 569, 584 (1982) (“The failure to conduct a formal arraignment itself is not reversible error. . . . [F]ailure to do so is not prejudicial error unless defendant objects and states that he is not properly informed of the charges.” (citations omitted)).<sup>6</sup>

*C. Guilty Knowledge Instruction and Plain Error*

[2] Defendant argues that the trial court committed plain error in failing to give the jury a discrete instruction on the requirement that he had guilty knowledge of the methamphetamine. Defendant relies primarily on *State v. Coleman*, 227 N.C. App. 354, 742 S.E.2d 346 (2013), in which this Court awarded a new trial to a defendant who asserted this same

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4. Regardless of whether this is the case procedurally, it is not true of trials for double jeopardy purposes. *See, e.g., State v. Courtney*, 372 N.C. 458, 463, 831 S.E.2d 260, 265 (2019) (“[J]eopardy attaches when a jury is sworn[.]” (citing *Richardson v. United States*, 468 U.S. 317, 326, 82 L. Ed. 2d 242, 251 (1984))).

5. Although a reversal for lack of subject matter jurisdiction would not turn on issues of prejudice, we note that Defendant certainly did not suffer any here. Defendant, not the State, determined how to proceed after an hour-long discussion with his attorney. He elected to go forward on the information after the trial court pointed out that re-indictment would have given him the relief he sought in his pretrial motion for a continuance and recusal. Further, it is clear from the record and pretrial motions that Defendant and his counsel understood that methamphetamine—not MDMA—served as the basis for the trafficking charge, and the substitution of methamphetamine in the information appears to have had no impact on Defendant’s defense or trial strategy.

6. Nor are we troubled by the question, raised at oral argument, as to whether the superseding information was filed before or after the State’s dismissal of the initial indictment; though the information was file-stamped nine minutes after the dismissal, Defendant signed the waiver and the State read the information into the record prior to the State dismissing the initial indictment. Further, the State made clear on the record its intention that the information and dismissal be filed “at the same time[.]”

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plain error argument in his trial and conviction for trafficking heroin. 227 N.C. App. at 355, 742 S.E.2d at 347. The defendant argued that the evidence showed that while he knew he possessed drugs, he did not know the drugs were heroin and the trial court should have instructed the jury it could convict only if it found that “the defendant knew that what he possessed was [heroin].” *Id.* at 356, 742 S.E.2d at 348 (citation and quotation marks omitted; alteration in original). This Court agreed, noting that the State introduced witness testimony and videotaped evidence of “consistent assertions by defendant, admitted as substantive evidence, that he thought he was carrying marijuana and cocaine” rather than heroin. *Id.* at 360, 742 S.E.2d at 350. We then held that the error was so prejudicial as to amount to plain error because: (1) guilty knowledge was “the defendant’s sole defense to the charges,” and “his entire defense was predicated upon a lack of knowledge that the substance he possessed was heroin[.]” *id.* at 361-62, 742 S.E.2d at 350-51; (2) “the closing arguments by both the prosecution and defense were in apparent agreement that this was the most contested issue[.]” *id.* at 361, 742 S.E.2d at 350; (3) “[n]one of the other facts were controverted,” *id.* at 363, 742 S.E.2d at 352; and (4) the prosecutor misstated the law concerning guilty knowledge in his closing arguments to the jury. *Id.*

The instant case shares some superficial similarities to *Coleman* in that Defendant argues evidence showed he did not know that methamphetamine, rather than simply marijuana, was present in his home. But unlike the defendant in *Coleman*, who did not deny knowledge of possessing a substance and instead denied knowing what it was, Defendant denied any knowledge of the existence of methamphetamine and instead argued to the jury that it belonged to Mr. Brown. Defendant’s only witness did not testify that Defendant was ignorant of the nature of the methamphetamine; he instead testified that Defendant was not aware of its existence in the home at all. Defendant brought motions to dismiss the charges for insufficiency of the evidence at the close of each party’s case, arguing in both instances that the State had failed to prove Defendant possessed the drugs. In closing argument, Defendant’s counsel emphatically argued to the jury that “the [S]tate must show that Mr. Stallings is the man that should be convicted. And Mr. Stallings is not that man. . . . Mr. Stallings is not that man because Mr. Brown has taken responsibility for the methamphetamine.” *Coleman* is inapposite to this case.

In any event, even assuming *arguendo* that the trial court erred in not giving a specific instruction on guilty knowledge in light of this evidence, it does not rise to the level of plain error that “had a probable



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impact on the jury's finding of guilt." *Odom*, 307 N.C. at 661, 300 S.E.2d at 378-79.

The State offered copious evidence that Defendant was the only occupant of the home where the drugs were found when it impeached Mr. Brown's testimony and Defendant's version of events. For example, the State showed that: (1) Defendant repeatedly told police that his roommate was "Michael Smith," but no Michael Smith was ever found; (2) police found no items in the home bearing Mr. Brown's name; (3) Defendant's name was the only name on the lease, the mail, and all paperwork found in the home; (4) Defendant acknowledged smoking marijuana, his phone contained dozens of text messages about marijuana sales, and police found both marijuana and a white crystalline substance on a scale in the home; (5) Mr. Brown denied knowing about any scales in the home when questioned on cross-examination; and (6) police found a white crystalline substance inside a pill bottle with Defendant's name on it. In short, Defendant's defense and the State's evidence at trial distinguish this case from *Coleman* and place it outside "the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Odom*, 307 N.C. at 660-61, 300 S.E.2d at 378 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154, 52 L. Ed. 2d 203, 212 (1977)).

**III. CONCLUSION**

Defendant's argument that his right to prosecution by indictment was violated by the filing of superseding information after the judge's address to the venire but before jury selection is misplaced. N.C. Gen. Stat. § 15A-646, unlike some procedural statutes governing other charging documents, does not impose a filing deadline on the State, and Defendant waived in writing his constitutional right to prosecution by indictment. We therefore hold the trial court did not lack subject matter jurisdiction to try and convict Defendant of trafficking methamphetamine. We further hold that Defendant has failed to demonstrate plain error warranting a new trial based on the absence of a jury instruction on guilty knowledge.

NO ERROR; NO PLAIN ERROR.

Judges STROUD and DILLON concur.



**STATE v. YARBOROUGH**

[271 N.C. App. 159 (2020)]

STATE OF NORTH CAROLINA

v.

GARRY ARITIS YARBOROUGH, DEFENDANT

No. COA19-752

Filed 21 April 2020

**1. Criminal Law—joinder—objection—no motion to sever—waiver—ineffective assistance of counsel claim**

Where the trial court—over defendant’s objection—granted the State’s motion for joinder of defendant’s charges (arising from a series of events in which defendant killed one person and shot at another in her home), defendant waived his right to severance by failing to file a motion to sever, and the Court of Appeals declined to review the issue under Appellate Rule 2. Because the record was silent regarding defendant’s counsel’s reasons for not filing a motion to sever, defendant’s alternative claim for ineffective assistance of counsel for failure to file the motion was dismissed without prejudice to file a motion for appropriate relief in the trial court.

**2. Evidence—lay witness testimony—defendant’s mental capacity—intent—sufficient additional evidence**

Where defendant was convicted of murder, attempted murder, and related charges stemming from a series of events in which defendant killed one person and shot at another person in her home, there was no reasonable probability that the jury would have reached a different result if the trial court had excluded allegedly improper lay witness medical testimony regarding defendant’s mental capacity because the State presented abundant evidence that defendant intended to commit the crimes charged—including that defendant chased the first victim before killing her, drove to the second victim’s home who he knew was a nurse so she could treat his gunshot wound, and stated on the phone that he had shot the first victim and had a hostage—and the lay witness also testified in non-medical terms that defendant seemed to know what he was doing.

**3. Homicide—attempted first-degree murder—malice—premeditation and deliberation—sufficiency of evidence**

The State presented sufficient evidence for the jury to reasonably conclude that defendant attempted to kill the victim with malice and premeditation and deliberation where defendant told the victim he would kill her if she did not follow his commands, he struck her over the head twice with his handgun, he stated over the

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phone that he had a hostage, and when the victim tried to escape by shutting the front door, defendant shot near the door handle four to six times before kicking the door and yelling.

**4. Homicide—attempted first-degree murder—jury instructions—malice—use of deadly weapon**

In a prosecution for attempted first-degree murder where the evidence showed defendant injured the victim by pistol-whipping her but she was not injured when he later shot into a door after she closed it between them, any error in the trial court’s jury instruction regarding the malice element (informing the jury they could infer malice from defendant inflicting a wound on the victim with a deadly weapon) was not prejudicial error because defendant’s intentional use of his gun against the victim gave rise to a presumption that defendant acted with malice, and malice could also be inferred by the lack of provocation by the victim and verbal threats made against her.

**5. Homicide—first-degree murder—jury instructions—self-defense**

In a first-degree murder trial where the evidence showed defendant chased the victim down and shot her after she had thrown her gun at him and ran away, defendant was not entitled to a self-defense instruction because there could no longer be any reasonable belief it was necessary for him to defend himself at the time he shot the victim. Further, defendant’s testimony that he could not remember shooting the victim, along with his expert’s testimony that defendant acted involuntarily due to preexisting psychological conditions, defeated his self-defense argument.

Appeal by Defendant from judgments entered 2 August 2018 by Judge David T. Lambeth, Jr., in Franklin County Superior Court. Heard in the Court of Appeals 18 March 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Hitchcock, for Defendant-Appellant.*

INMAN, Judge.

Defendant Garry Aritis Yarbrough (“Defendant”) appeals from his convictions following jury verdicts finding him guilty of first-degree murder, attempted first-degree murder, first-degree kidnapping, assault with

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a deadly weapon inflicting serious injury, assault with a deadly weapon with intent to kill, two counts of discharging a firearm into occupied property, felony breaking or entering, and possession of a firearm by a felon. Defendant argues that the trial court erred by: (1) joining his charges for a single trial, or, in the alternative, that his counsel was ineffective; (2) allowing a lay witness to testify about his medical condition; (3) denying Defendant's motion to dismiss the attempted first-degree murder charge for lack of sufficient evidence of malice, premeditation, and deliberation; (4) instructing the jury on attempted first-degree murder in a misleading manner that lowered the State's burden of proof; and (5) denying defense counsel's request for a self-defense instruction. After careful review, we hold Defendant has failed to demonstrate prejudicial error and dismiss his claim of ineffective assistance of counsel without prejudice to allow him to file a motion for appropriate relief in the trial court.

**I. FACTUAL AND PROCEDURAL HISTORY**

The evidence introduced at trial tends to show the following facts:

Defendant and his girlfriend, Tracy Williams ("Williams"), met around 2009 or 2010 while Defendant was in prison for manslaughter. The two continued their relationship after Defendant was released in 2010. By March 2014, their relationship became volatile and they would cycle between living together and apart. Beginning in April 2015, Defendant was charged with misdemeanor assault and kidnapping Williams when he allegedly prevented her from leaving his residence in Zebulon. In early July 2015, Williams obtained an *ex parte* domestic violence protective order against Defendant.<sup>1</sup>

On 17 July 2015, Defendant and Williams, driving separate vehicles, stopped next to each other at an intersection in Franklinton. Williams suspected that Defendant had been following her. Defendant told Williams that "he could put his hands on her at any time he wanted to." Williams then fired two shots from her handgun into the back window of Defendant's vehicle—Defendant was not injured.

On 26 July 2015, Williams stopped her vehicle at an ATM in a Food Lion parking lot in Franklinton Square. Moments later, Defendant arrived in a black SUV and parked behind Williams' vehicle. Defendant had a handgun tucked in his waist. The two started arguing while Williams was

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1. At trial, Defendant presented evidence that Williams was exaggerating these experiences to extort him for money. Defendant testified that at one point he withdrew \$20,000 from his business account to pay Williams to drop the charges.

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sitting in her vehicle and Defendant was beside her kneeling down. The two got into a physical altercation, and Williams then drew her handgun and shot Defendant in the leg. She attempted to fire the gun a second time, but the gun jammed. Williams threw the gun at Defendant and ran away, screaming for help. Defendant chased after Williams while he loaded the magazine in his handgun. Williams attempted to get into the driver's seat of the black SUV, but Defendant caught up to her, pushed her head down, and fatally shot her in the back of her head. Defendant then threw Williams out of the vehicle, drove out of the parking lot, and ran over her body in the process.<sup>2</sup>

Defendant fled and made his way to the residence of Kim Elmore ("Elmore"), a registered nurse, parking the SUV in her backyard rather than in the driveway. Defendant repeatedly rang the doorbell and knocked on the door to get Elmore's attention. Elmore opened the front door a few inches and recognized Defendant as the repairman who had worked on her air conditioning unit a few months earlier. Elmore tried to shut the door, but Defendant pushed his way in and asked if anyone else was home. When Elmore told Defendant to leave, he pointed a handgun to her forehead and said that he would kill her. Defendant then struck Elmore twice over the head with the butt of his gun, causing her to bleed profusely.

Defendant asked Elmore for band-aids and towels. Although Defendant's leg wound was not bleeding, he wanted Elmore to provide a tourniquet for his leg and bandage the wound. While Elmore was working on Defendant's leg, Defendant called and talked to an acquaintance on the phone. Elmore overheard Defendant "saying something about a van, that he had killed [Williams], and he had a hostage." Elmore begged Defendant not to kill her, and he told her that "if [she] did what he said, he would just leave [her] there tied up," despite saying on the phone that he had a hostage.

After Elmore finished, Defendant got up and told her that they were leaving. While the two were heading to the front door, Elmore said she was going to turn the lights off. As Defendant crossed the door and stepped outside, Elmore quickly shut the door and locked it. Defendant then turned around and fired four to six shots near the doorknob and kicked and yelled at the door. Elmore ran to the bathroom and called 911 and Defendant drove from the scene. Defendant was later found and arrested in a hotel in Raleigh.

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2. Though the medical examiner testified that there was no evidence Williams was run over, all three witnesses who observed the incident testified that Defendant drove over Williams' body.

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Defendant was indicted for first-degree murder, attempted first-degree murder, first-degree kidnapping, felony breaking or entering, assault with a deadly weapon inflicting serious injury, assault with a deadly weapon with intent to kill, burning personal property, possession of a firearm by a felon, and two counts of discharging a weapon into occupied property. In October 2017, the State filed a motion to join all of Defendant's charges for a single trial.

Defendant's charges came on for trial on 9 July 2018. Both the State and defense counsel presented expert witness testimony regarding Defendant's mental state at and around the time of the alleged crimes. Following the State's evidence, defense counsel motioned to dismiss all of Defendant's charges for lack of evidence. The trial court dismissed the burning personal property charge and denied the remainder of defense counsel's motion. At the close of all the evidence, the trial court denied defense counsel's renewed motion to dismiss all remaining charges. The jury found Defendant guilty on all counts.

The trial court sentenced Defendant to life imprisonment without parole for first-degree murder and entered consolidated judgments imposing consecutive prison terms: 238-298 months for attempted first-degree murder; 110-144 months for first-degree kidnapping, felony breaking or entering, and assault with a deadly weapon inflicting serious injury; 97-129 months for two counts of discharging a weapon into occupied property; 38-58 months for assault with a deadly weapon with intent to kill; and 19-32 months for possession of a firearm by a felon.

Defendant gave oral notice of appeal.<sup>3</sup>

**II. ANALYSIS***A. Joinder of Charges*

**[1]** On the first day of trial, before jury selection, defense counsel objected to the State's motion for joinder, contending that his charges should be severed. Following arguments, the trial court orally granted the State's motion (and later via written order). Defendant contends the trial court erred in granting the State's motion. We disagree.

Multiple offenses may be joined for one trial so long as they "are based on the same act or transaction or on a series of acts or transactions

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3. As an initial matter, we hold that all of Defendant's constitutional claims embedded in his arguments on the same issues are unpreserved and we will not address them on appeal. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal.").

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connected together or constituting parts of a single scheme or plan.” N.C. Gen. Stat. § 15A-926(a) (2017). In concluding whether consolidation was appropriate, we review whether: (1) there is a transactional connection among the offenses; and (2) “the accused can receive a fair hearing on more than one charge at the same trial.” *State v. Silva*, 304 N.C. 122, 126, 282 S.E.2d 449, 452 (1981). While a transactional connection between the offenses is a question of law reviewable on appeal, the decision to join the offenses for one trial, *i.e.*, determining “whether consolidation hinders or deprives the accused of his ability to present his defense,” is within “the sound discretion of the trial judge.” *State v. Montford*, 137 N.C. App. 495, 498, 529 S.E.2d 247, 250 (2000) (quotation marks and citations omitted).

Section 15A-927 of our General Statutes requires a criminal defendant to file a motion to sever charges prior to trial or, if the grounds for severance are not known before trial, file a motion to sever no later than the close of the State’s evidence. N.C. Gen. Stat. §§ 15A-927(a)(1)-(2) (2017). A defendant waives his right to severance “if the motion is not made at the appropriate time.” *Id.* § 15A-927(a)(1); *see also State v. Walters*, 357 N.C. 68, 79-80, 588 S.E.2d 344, 351 (2003) (dismissing the defendant’s severance issue due to his trial counsel’s failure to file any motion for severance). Here, Defendant made no motion to sever, either before or during trial, but merely objected to the State’s motion for joinder. Defendant now asks this Court to exercise its discretion under Rule 2 of our Rules of Appellate Procedure to review this issue. N.C. R. App. P. 2 (2020). We decline to do so.

Defendant requests, in the event we hold he has waived this issue for appellate review, that we consider whether he received ineffective assistance of counsel (“IAC”).

We decline to address this issue on direct appeal, as it is more appropriate for Defendant to file a motion for appropriate relief (“MAR”). Though this court can review IAC claims on direct appeal, we can do so only if we can decide the issue from the record on appeal without further investigation. *State v. Thompson*, 359 N.C. 77, 122-23, 604 S.E.2d 850, 881 (2004). Because the record is silent as to Defendant’s counsel’s reasoning in declining to file a motion to sever, we dismiss his IAC claim without prejudice so he can file a MAR in the trial court.

*B. Lay Witness Testimony*

[2] Defendant next argues that the trial court erred in allowing Elmore, a lay witness, to offer expert medical testimony regarding his mental capacity. We review the trial court’s admission of lay witness opinion

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testimony for abuse of discretion. *State v. Sharpless*, 221 N.C. App. 132, 137, 725 S.E.2d 894, 898 (2012).

During direct examination, Elmore, a registered nurse, testified as follows:

[STATE:] In the five to ten minutes, give or take a few minutes on either side of that, did you believe that in your time—let me—did you believe that [Defendant] was not in touch with reality?

[ELMORE:] No, he knew what he was doing.

[STATE:] And why do you say that?

[ELMORE:] Because of the steps. Cognitively—

[Objection overruled]

[ELMORE:] In my experience as a nurse, I have seen a lot.

[Objection]

After defense counsel's last objection, a *voir dire* hearing was held outside the presence of the jury to determine whether Elmore's testimony went beyond that of a lay witness. Defense counsel did not object to Elmore's statement that Defendant "knew what he was doing," but to Elmore's conclusions from her observations "based upon her experience and training" as a nurse. The trial court sustained defense counsel's objection and instructed the prosecutor to continue questioning without asking Elmore for a medical opinion. The trial court then instructed the jury to disregard Elmore's statement "dealing with cognitive steps" that Defendant may have taken.

On redirect examination, the prosecutor elicited the following testimony from Elmore:

[STATE:] Have you dealt with psych patients?

[ELMORE:] Oh, yes.

[STATE:] And how would you compare [Defendant's] behavior on that day to psych patients that you've dealt with?

[Objection overruled]

[STATE:] You can answer that, ma'am, yes.

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[ELMORE:] Psych patients, they're just a different breed. They're just not in touch with reality. They have trouble processing their thoughts.

[Objection overruled]

[ELMORE:] They have trouble going through steps, processing their thoughts. They just have trouble functioning cognitively and physically and . . . .

[STATE:] So was that what you saw in [Defendant] or did you see something different in him?

[ELMORE:] I saw evil, mean.

[Objection overruled]

[STATE:] Was he able to process his thoughts?

[ELMORE:] Yes.

[STATE:] Was he in touch with reality?

[ELMORE:] Yes.

[Objection sustained]

[STATE:] Was there ever a time in your observations that you believed he did not know what was going on?

[ELMORE:] No.

Rule 701 of the North Carolina Rules of Evidence provides that non-expert testimony “is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.” N.C. Gen. Stat. § 8C-1, Rule 701 (2017). While lay witnesses with personal knowledge of a person’s mental state can “give an opinion as to an emotional state of another,” they “may not offer a specific psychiatric diagnosis of a person’s mental condition.” *State v. Storm*, 228 N.C. App. 272, 277-78, 743 S.E.2d 713, 717 (2013) (citations omitted); *see also State v. Davis*, 349 N.C. 1, 30, 506 S.E.2d 455, 471 (1998) (affirming the trial court’s decision prohibiting lay witness testimony regarding whether the defendant “appeared to be psychotic”).

Defendant contends that the trial court erroneously allowed Elmore to testify that he was “able to process his thoughts,” was “in touch with reality,” and could “function[] cognitively and physically.” Defendant further asserts that, because the key issue at trial was his ability to



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formulate the specific intent element of the charges, he was prejudiced by Elmore's impermissible lay testimony, because the State's and Defendant's respective expert witnesses "largely canceled out the testimony of the other."

The State argues that any error resulting from Elmore's challenged testimony was invited by defense counsel, who cross-examined Elmore about her prior statements to police comparing Defendant to a "psych patient."

Assuming *arguendo* that the alleged error was not invited, Defendant cannot demonstrate that, but for the impermissible testimony, "there is a reasonable possibility that . . . a different result would have been reached at trial." *Storm*, 228 N.C. App. at 278, 743 S.E.2d at 718 (quoting N.C. Gen. Stat. § 15A-1443(a) (2011)).

The State introduced an abundance of evidence showing that Defendant intended to commit the crimes in question. Following a brief physical altercation with Williams in the parking lot, Defendant chased after a defenseless Williams while reloading his handgun, grabbed and held her down, and shot her in the back of the head. Defendant then drove directly to Elmore's residence. Defendant was not a friend of Elmore's but knew she was a nurse. Instead of parking in Elmore's driveway, Defendant parked the black SUV in the backyard. Defendant first asked her if anyone was home. He then pointed the gun at her head and demanded that she attend to his gunshot wound or else he would kill her. Defendant reported to someone on the phone that he had shot Williams and had a hostage. Elmore also testified, in non-medical terms, that Defendant seemed as if he understood what he was doing. Considering this evidence, we are unable to conclude that, had the trial court excluded Elmore's alleged improper medical opinion testimony, there is a reasonable possibility the result of any of Defendant's charges would have been different.

*C. Sufficiency of the Evidence*

[3] Defendant contends that the trial court erred in denying his motion to dismiss the attempted first-degree murder charge because the State did not establish that he acted with malice and premeditation and deliberation. We disagree.

When reviewing a trial court's denial of a motion to dismiss for sufficiency of the evidence, our standard of review is well-known:

The standard for ruling on a motion to dismiss is whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the

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perpetrator of the offense. Substantial evidence is relevant evidence which a reasonable mind might accept as adequate to support a conclusion. In ruling on a motion to dismiss, the trial court must consider all of the evidence in the light most favorable to the State, and the State is entitled to all reasonable inferences which may be drawn from the evidence. Any contradictions or discrepancies arising from the evidence are properly left for the jury to resolve and do not warrant dismissal.

*State v. Wood*, 174 N.C. App. 790, 795, 622 S.E.2d 120, 123 (2005) (quotation marks and citations omitted). We review a denial of a motion to dismiss *de novo*. *State v. Cox*, \_\_ N.C. App. \_\_, \_\_, 825 S.E.2d 266, 268 (2019).

To prove attempted first-degree murder, the State must demonstrate that the defendant (1) had the specific intent to kill another; (2) performed an overt act calculated to carry out that intent, going beyond mere preparation; and (3) acted with malice and premeditation and deliberation. *State v. Tirado*, 358 N.C. 551, 579, 599 S.E.2d 515, 534 (2004) (citing N.C. Gen. Stat. § 14-17 (2003)). Premeditation is an act “thought out beforehand for some length of time, however short, but no particular amount of time is necessary.” *State v. Cozart*, 131 N.C. App. 199, 202, 505 S.E.2d 906, 909 (1998). Deliberation “means an intent to kill, carried out in a cool state of blood, in furtherance of . . . an unlawful purpose and not under the influence of a violent passion, suddenly aroused by lawful or just cause or legal provocation.” *Id.* Malice is “not only hatred, ill-will, or spite, as it is ordinarily understood, but it also means that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification.” *State v. Tilley*, 18 N.C. App. 300, 302, 196 S.E.2d 816, 818 (1973). Malice and premeditation and deliberation, in the context of attempted first-degree murder, “may be inferred from the conduct and statements of the defendant before and after the incident, ill-will or previous difficulty between the parties, and evidence regarding the manner of the attempted killing.” *State v. Peoples*, 141 N.C. App. 115, 118, 539 S.E.2d 25, 28 (2000).

Construing all evidence and inferences in favor of the State, we hold the State presented sufficient evidence for the jury to reasonably conclude that Defendant attempted to kill Elmore with malice and premeditation and deliberation. Defendant told Elmore he would kill her if she did not follow his commands, he struck her over the head twice with his handgun, and he stated on the phone that he had a hostage. When Elmore tried to escape by shutting the front door, Defendant shot the door near the doorknob four to six times before kicking the door and

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yelling. Although Defendant argues he fired because he was startled and did not know Elmore was behind the door, we have consistently held that contradictions and alternative hypotheses are for the jury to weigh and resolve. *See, e.g., State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988).

*D. Malice Instruction*

[4] Defendant argues the trial court committed prejudicial error by instructing the jury regarding the malice element of attempted first-degree murder as follows:

If the State proves beyond a reasonable doubt that the defendant *intentionally inflicted a wound upon the victim with a deadly weapon, you may infer first, that the defendant acted unlawfully and second, that it was done with malice*, but you are not compelled to do so. You may consider this along with all other facts and circumstances in determining whether the defendant acted unlawfully and with malice.

(emphasis added). Defendant contends the italicized portion of the instruction could have misled the jury by effectively lowering the State's burden of proof. Defendant contends that there was no evidence that his shots hit Elmore when he fired into her front door and that the jury could not infer malice from his twice pistol-whipping her.

Defendant cannot demonstrate prejudicial error. We have held that, "in the context of attempted first degree murder, the intentional use of a deadly weapon itself gives rise to a presumption that the act was undertaken with malice." *Peoples*, 141 N.C. App. at 118, 539 S.E.2d at 28-29 (citation omitted). Malice may also be inferred by other circumstances including "(1) lack of provocation by the intended victims; (2) conduct and statements of the defendant both before and after the attempted killing; [and] (3) threats made against the intended victims by the defendant." *State v. Teague*, 216 N.C. App. 100, 106-07, 715 S.E.2d 919, 924 (2011). Given Defendant's use of a deadly weapon and these three additional circumstances, we are unpersuaded that, absent the argued instructional component, there is a reasonable possibility that the jury would have reached a different verdict on the charge of attempted first-degree murder.

*E. Self-Defense Instruction*

[5] Defendant finally argues that the trial court committed prejudicial error in its instruction to the jury regarding the first-degree murder charge by failing to include an instruction on self-defense. We disagree.

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Our Court reviews a trial court's decisions regarding jury instructions *de novo*. The trial court must instruct the jury on self-defense if there is any evidence in the record from which it can be determined that it was necessary or reasonably appeared to be necessary for defendant to kill his adversary in order to protect himself from death or great bodily harm. Moreover, the trial court must provide a self-defense instruction if the above criteria is met even though there is contradictory evidence by the State or discrepancies in the defendant's evidence. With regard to whether a defendant is entitled to a jury instruction on self-defense, the trial court must consider the admissible evidence in the light most favorable to the defendant.

*State v. Cruz*, 203 N.C. App. 230, 235, 691 S.E.2d 47, 50-51 (2010) (quotation marks, citations, and alterations omitted).

Here, the trial court declined Defendant's request for a jury instruction on both perfect and imperfect self-defense. A perfect self-defense instruction is warranted if the following elements are established:

- (1) [I]t appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself from death or great bodily harm; and
- (2) defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness; and
- (3) defendant was not the aggressor in bringing on the affray, *i. e.*, he did not aggressively and willingly enter into the fight without legal excuse or provocation; and
- (4) defendant did not use excessive force, *i. e.*, did not use more force than was necessary or reasonably appeared to him to be necessary under the circumstances to protect himself from death or great bodily harm.

*State v. Norris*, 303 N.C. 526, 530, 279 S.E.2d 570, 572-73 (1981) (citations omitted). But if the defendant, "although without murderous intent, was the aggressor in bringing on the difficulty, or [he] used excessive force," then he is only eligible for an imperfect self-defense instruction and "is guilty at least of voluntary manslaughter." *Id.* at 530, 279 S.E.2d at 573 (citations omitted).

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Consequently, “for defendant to be entitled to an instruction on self-defense, the following questions must be answered affirmatively: (1) Is there evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm, and (2) if so, was that belief reasonable?” *State v. Meadows*, 158 N.C. App. 390, 401, 581 S.E.2d 472, 478 (2003) (quotation marks and citation omitted).

Here, three witnesses to the confrontation between Williams and Defendant in the parking lot testified that immediately after Williams shot Defendant in the leg, her handgun jammed, she threw it at Defendant, and she attempted to flee from him while screaming for help. Defendant then ran after her, reloaded his own handgun, and proceeded to grab Williams and fire a bullet into the back of her head. Assuming Defendant reasonably believed it was necessary to defend himself with deadly force when Williams shot him, that belief could not have remained reasonable after Williams’ handgun jammed and she threw it at Defendant and ran away.

Defendant testified that he “was in fear for [his] life” when Williams shot him in the leg, but that he did not remember chasing or shooting Williams after that. Defendant’s expert witness testified that Defendant was acting instinctively and involuntarily due to his preexisting psychological conditions, including intermittent bouts of amnesia.

Defendant’s testimony that he does not recall shooting Williams, combined with his expert’s testimony that Defendant acted involuntarily, defeat his self-defense argument. *See State v. Cook*, 254 N.C. App. 150, 153, 802 S.E.2d 575, 577 (2017) (“[O]ur Supreme Court has repeatedly held that a defendant who fires a gun in the face of a perceived attack is not entitled to a self-defense instruction if he testifies that he did not intend to shoot the attacker when he fired the gun.” (citation and emphasis omitted)); *State v. Hinnant*, 238 N.C. App. 493, 496, 768 S.E.2d 317, 320 (2014) (“[T]he testimony of a witness stating that it was reasonable for the defendant to believe deadly force was necessary was irrelevant where the defendant himself testified that he did not intend to shoot anyone when he fired his weapon.” (citation omitted)). Consistent with the defense evidence, the trial court instructed the jury that it could not find Defendant guilty if it found he was not able to exercise voluntary control of his actions. *See State v. Boggess*, 195 N.C. App. 770, 772, 673 S.E.2d 791, 793 (2009) (“[T]he absence of consciousness not only precludes the existence of any specific mental state, but also excludes the possibility of a voluntary act without which there can be no criminal liability.” (quotation marks and citation omitted)).

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Based on all of the evidence, considered in the light most favorable to Defendant, we conclude that the trial court did not err in its instruction. Also, the undisputed evidence that Defendant chased Williams when she was unarmed, grabbed her, and shot her in the back of the head precludes Defendant's argument that, had the instruction been given, there is a reasonable possibility the jury would not have found him guilty of first-degree murder.

**III. CONCLUSION**

For the foregoing reasons, Defendant has failed to demonstrate prejudicial error as to any of his issues on appeal. We dismiss his IAC claim without prejudice to allow him to file a MAR in the trial court.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Judges ZACHARY and YOUNG concur.

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KARA ANN SULLIVAN (FORMERLY WOODY), PLAINTIFF  
v.  
SCOTT NELSON WOODY, DEFENDANT, AND E. LYNN WOODY AND  
JAMES NELSON WOODY, INTERVENORS

No. COA19-514

Filed 21 April 2020

**1. Attorney Fees—custody action—visitation rights—award against intervenor grandparents**

The trial court had the authority under N.C.G.S. § 50-13.6 to award attorney fees against intervenor grandparents seeking visitation rights in a custody action because the grandparents' action constituted an action for "custody or support" under section 50-13.1(a).

**2. Attorney Fees—custody action—visitation rights—award against intervenor grandparents—reasonableness of fees**

The trial court failed to make sufficient findings regarding the reasonableness of the amount of attorney fees awarded against the intervenor grandparents as required by N.C.G.S. § 50-13.6. Although the court made findings regarding the reasonableness of the plaintiff's total attorney fees, including claims to which the intervenors were not parties, the court did not make necessary findings regarding the scope of the legal services rendered and time spent

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by plaintiff's attorneys specifically incurred as a result of defending against the intervenors' visitation action, necessitating remand.

Appeal by intervenors from judgment entered 12 September 2018 by Judge Rebecca Eggers-Gryder in Mitchell County District Court. Heard in the Court of Appeals 31 March 2020.

*Jackson Family Law, by Jill S. Jackson, for plaintiff-appellee.*

*Scott Nelson Woody, pro se, defendant-appellee.*

*Arnold & Smith, PLLC, by Matthew R. Arnold and Ashley A. Crowder, for intervenors-appellants.*

BERGER, Judge.

E. Lynn Woody and James Nelson Woody (collectively, "Intervenors") appeal from an order entered September 12, 2018, which found Intervenors jointly liable with Scott Nelson Woody ("Defendant") for the attorneys' fees of Kara Ann Sullivan ("Plaintiff"). On appeal, Intervenors argue, among other things, that the trial court erred (1) when it made an award of attorneys' fees against Intervenors; and (2) when it found Intervenors liable for attorneys' fees unrelated to their involvement in the custody action. Although the trial court was statutorily authorized to make an award of attorneys' fees against Intervenors, we conclude that the trial court failed to make requisite findings. Therefore, we reverse and remand for the trial court to make additional findings of fact. Because we conclude the trial court failed to make those findings necessary for the fees awarded, we need not address Intervenors' additional assignments of error, all of which relate to the award.

**Factual and Procedural Background**

This appeal arises from a heavily litigated child custody dispute that has now stretched on for more than three and a half years. Plaintiff and Defendant were married on May 12, 2006. Plaintiff filed a complaint seeking temporary and permanent custody of a minor child, child support, and attorneys' fees on June 17, 2016. Plaintiff and Defendant were not separated when the complaint was originally filed. The parties subsequently divorced.

On August 21, 2016, Intervenors, who are the parents of Defendant and grandparents of the minor child, filed a motion to intervene. The trial court granted Intervenors' motion on October 31, 2016. On December

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5, 2016, Intervenor filed a complaint seeking temporary and permanent visitation rights and attorneys' fees. Plaintiff filed an answer to Intervenor's complaint on February 8, 2017.

Before the matter was called for trial, Plaintiff and Defendant stipulated that Plaintiff was a fit and proper parent and that it would be in the best interest of the minor child to reside with Plaintiff, who would have legal and physical custody of the minor child. A trial was held on the remaining issues in the case—including Defendant's visitation rights, Intervenor's visitation rights, and Plaintiff's claim for attorney's fees—over six days between March 28, 2018 and August 31, 2018.

On September 12, 2018, the trial court entered a final order in the case. Pursuant to the final order, the trial court granted Intervenor visitation rights with the minor child. The trial court also ordered that Defendant and Intervenor were to be jointly liable for Plaintiff's attorneys' fees in the amounts of \$12,720.00 and \$74,491.50.

Intervenor filed a Notice of Appeal on October 4, 2018. On appeal, Intervenor contend, among other things, that the trial court erred (1) when it made an award of attorneys' fees against Intervenor; and (2) when it found Intervenor liable for attorneys' fees unrelated to their involvement in the custody action.

### Analysis

#### I. Statutory Authorization for Attorney Fees

[1] Intervenor first argue that the trial court erred as a matter of law in making an award of Plaintiff's attorneys' fees against Intervenor. Specifically, Intervenor argue that the trial court erred by interpreting Section 50-13.6 of the North Carolina General Statutes to allow an award of attorney fees against intervening grandparents. We disagree.

We review a trial court's statutory interpretation *de novo*. *Dion v. Batten*, 248 N.C. App. 476, 485, 790 S.E.2d 844, 851 (2016). "Statutory interpretation begins with the plain meaning of the words of the statute." *Id.* at 485, 790 S.E.2d at 851 (citation omitted).

As a general matter, North Carolina law does not permit a trial court to award attorney fees unless such fees are specifically authorized by statute. *Wiggins v. Bright*, 198 N.C. App. 692, 695, 679 S.E.2d 874, 876 (2009). Under Section 50-13.6, in any "action or proceeding for the custody or support" of a minor child, "the court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the



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suit.” N.C. Gen. Stat. § 50-13.6 (2019). “Custody” is defined by Section 50-13.1(a) to include “custody or visitation or both” unless the General Assembly’s contrary intent is clear from the statutory scheme. N.C. Gen. Stat. § 50-13.1(a) (2019).

Under Section 50-13.2(b1), “[a]n order for custody of a minor child may provide visitation rights for any grandparent of the child as the court, in its discretion, deems appropriate.” N.C. Gen. Stat. § 50-13.2(b1) (2019). To qualify for visitation rights under this section, the grandparent must have a substantial relationship with the minor child. N.C. Gen. Stat. § 50-13.2(b1).

Accordingly, under the plain language of this statutory scheme, an action by intervening grandparents for visitation rights under Section 50-13.2(b1) qualifies as an action for “custody” by operation of Section 50-13.1(a).

In *McIntyre v. McIntyre*, our Supreme Court analyzed Section 50-13.2(b1), and its sister sections, to conclude that grandparents have no “right to visitation when the natural parents have legal custody of their children and are living with them as an intact family.” *McIntyre v. McIntyre*, 341 N.C. 629, 634, 461 S.E.2d 745, 749 (1995) (citation omitted). Within this context, our Supreme Court determined that “[r]eading [Section] 50-13.1(a) in conjunction with [Section] 50-13.2(b1) . . . strongly suggests that the legislature did not intend ‘custody’ and ‘visitation’ to be interpreted as synonymous in the context of grandparents’ rights.” *Id.* at 634-35, 461 S.E.2d at 749. As a result, our Supreme Court held that the trial court had no jurisdiction to hear a complaint for visitation by grandparents when the parents themselves were not disputing custody. *Id.* at 635, 461 S.E.2d at 750.

However, our Supreme Court’s analysis in *McIntyre* did not address Section 50-13.6 and is not controlling in this case. Since *McIntyre*, our Court has had the opportunity to examine whether “custody” and “visitation” are synonymous within the context of awarding attorney fees to an intervening grandparent under Section 50-13.6. *Smith v. Barbour*, 195 N.C. App. 244, 671 S.E.2d 578 (2009).

In *Barbour*, a minor child’s grandparents intervened during a custody dispute between parents to secure visitation rights with the minor child. *Id.* at 248, 671 S.E.2d at 581. The trial court ultimately concluded that it was in the best interests of the child for the parents to have joint legal and physical custody and the grandparents to have specified visitation privileges. *Id.* at 248, 671 S.E.2d at 582. The trial court also ordered

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the minor child's father to pay \$40,000.00 of the attorney fees expended by the grandparents in securing visitation. *Id.* at 254, 671 S.E.2d 585.

On appeal, our Court upheld the award to the intervening grandparents under Section 50-13.6. *Id.* at 255, 671 S.E.2d at 586. Accordingly, this Court has determined that an action by intervening grandparents to secure visitation rights qualifies as an "action or proceeding for the custody or support" of a minor child for purposes of Section 50-13.6.

Here, the trial court's order cited our Court's holding in *Barbour* and concluded that "[i]f intervenors can ask for and receive attorney's fees, then they can also pay attorney's fees." We agree. If an action by intervening grandparents to secure visitation rights falls within the scope of Section 50-13.6 as an "action or proceeding for the custody or support, or both, of a minor child" for the purposes of awarding attorney fees to the grandparents, then such an action must also fall within the scope of the statute for the purposes of ordering the grandparents to pay fees. *See id.* at 255, 671 S.E.2d at 586.

Therefore, we conclude that an award of attorney fees could be made against Intervenor under Section 50-13.6 because an action by intervening grandparents for visitation is one for "custody or support" by operation of Section 50-13.1(a). *See* N.C. Gen. Stat. § 50-13.1(a) (defining "custody" to include "custody or visitation or both" unless the General Assembly's contrary intent is clear). As such, the trial court properly concluded that an award of attorneys' fees against grandparents seeking visitation rights was authorized by Section 50-13.6.

II. Amount of Attorneys' Fees Awarded to Plaintiff

[2] Intervenor next contend that the trial court erred as a matter of law when it made Intervenor jointly liable for attorneys' fees that did not arise from Intervenor's claim. We agree that the trial court failed to make some of the reasonableness findings necessary to calculate the award of attorneys' fees against Intervenor. Therefore, we reverse and remand for the trial court to make appropriate factual findings regarding the costs incurred by Plaintiff in defending against Intervenor's visitation claim.

Attorney fees can only be awarded in a custody proceeding where the trial court has made adequate findings of fact that the moving party acted in good faith and had insufficient means to defray the expense of the suit. N.C. Gen. Stat. § 50-13.6; *Cox v. Cox*, 133 N.C. App. 221, 227-28, 515 S.E.2d 61, 66 (1999). Additionally, "[b]ecause [Section] 50-13.6 allows for an award of *reasonable* attorney's fees, cases construing

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the statute have in effect annexed an additional requirement concerning reasonableness onto the express statutory ones.” *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986) (emphasis in original) (citation omitted). The record must also contain “additional findings of fact upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney’s hourly rate, and its reasonableness in comparison with that of other lawyers.” *Id.* at 595-96, 339 S.E.2d at 828 (citations omitted). “Whether these statutory requirements are met is a question of law, reviewable on appeal.” *Cox*, 133 N.C. App. at 228, 515 S.E.2d at 66 (citations omitted). This Court reviews questions of law *de novo*. *Green v. Green*, 255 N.C. App. 719, 724, 806 S.E.2d 45, 49 (2017).

In the instant case, the trial court’s findings support Plaintiff’s good faith and that Plaintiff had insufficient means to defray the expense of this heavily litigated child custody dispute. The trial court also made extensive findings concerning the nature of the legal services rendered, the hourly rates of Plaintiff’s attorneys, and the reasonableness of those rates. However, the trial court failed to make the findings of fact necessary for a determination regarding what amount of Plaintiff’s attorneys’ fees were reasonably incurred as the result of litigation by Intervenor, as opposed to litigation by Defendant.

Despite Intervenor arguing in opposition to the award that they should not be held responsible for those fees unrelated to their claim for visitation, the trial court failed to make those findings required by our precedent concerning (1) the scope of legal services rendered by Plaintiff’s attorneys in defending against Intervenor’s visitation claim, or (2) the time required of Plaintiff’s attorneys in defending against that claim. Rather, the trial court’s findings broadly relate to Plaintiff’s attorneys’ fees associated with the entire action—including those claims brought by Defendant, to which Intervenor were not parties.

Plaintiff has cited no authority, and we are aware of none, holding that intervenors may be held liable for attorneys’ fees incurred as the result of claims or defenses they did not assert simply because they paid the opposing party’s attorney fees.

Because the trial court failed to make the requisite reasonableness findings to make an award of attorneys’ fees against Intervenor under Section 50-13.6, we must reverse and remand for additional findings of fact. *See Cobb*, 79 N.C. App. at 595-96, 339 S.E.2d at 828.

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Conclusion

For the reasons stated herein, the trial court was statutorily authorized to make an award of attorneys' fees against Intervenor. However, we reverse and remand for additional findings concerning the reasonableness of a fee award against Intervenor.

REVERSED AND REMANDED.

Chief Judge McGEE and Judge INMAN concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 APRIL 2020)

BARRINGTON v. DYER No. 19-640	Carteret (18CVS767)	Dismissed
IN RE O.L. No. 19-626	Granville (18SPC50667)	Affirmed
MARTIN v. LANDFALL COUNCIL OF ASS'NS, INC. No. 19-883	New Hanover (16CVS2284)	Affirmed in part, reversed in part, and remanded
STATE v. CHAMBERS No. 19-984	Guilford (17CRS80917)	No Error
STATE v. CUEVAS No. 19-766	Harnett (99CRS667)	Affirmed
STATE v. CUMMINGS No. 19-864	Craven (17CRS53862)	Vacated and Remanded
STATE v. FORE No. 19-765	Harnett (06CRS51459)	Affirmed
STATE v. GAITHER No. 19-922	Cleveland (17CRS56416-18) (17CRS56420-21)	No Error
STATE v. HARGETT No. 19-718	Craven (15CRS50867)	No Error
STATE v. HAYNER No. 19-397	Randolph (15CRS54067) (15CRS54486)	Affirmed
STATE v. HICKS No. 19-645	Randolph (15CRS55688) (16CRS51293)	Judgment in 15 CRS 055688 Reversed. Judgment in 16 CRS 051293 Vacated and Remanded.
STATE v. JOHNSON No. 19-767	Harnett (05CRS56253) (05CRS56915-18)	Affirmed

STATE v. JOHNSON No. 19-757	Wake (16CRS220559) (16CRS220721) (16CRS222322) (17CRS3788-93) (17CRS65-66)	Affirmed
STATE v. JOHNSON No. 19-529	Wake (17CRS222594)	No Prejudicial Error
STATE v. JONES No. 19-759	Wake (17CRS220317-19)	Dismissed
STATE v. McCOY No. 19-99	Alamance (13CRS53245)	Vacated and Remanded
STATE v. RICE No. 19-788	Mecklenburg (07CRS249456)	Vacated and Remanded.
STATE v. STOKES No. 19-684	Cleveland (17CRS55084) (17CRS55237-38)	No Error
WOODARD v. N.C. DEP'T OF TRANSP. No. 19-816	N.C. Industrial Commission (TA-26729)	Affirmed

**BEST v. STATON**

[271 N.C. App. 181 (2020)]

KIMBERLY BEST (FORMERLY BEST-STATON), PLAINTIFF

v.

RANDALL STATON, DEFENDANT

No. COA19-638

Filed 5 May 2020

**1. Divorce—equitable distribution—subject matter jurisdiction—claim asserted after separation**

The trial court had subject matter jurisdiction to hear a husband's claim for equitable distribution (ED), which was asserted as a counterclaim filed after the parties' date of separation. The husband's previous responsive pleading (filed prior to separation), in which he stated his intention to file an ED claim upon the parties' separation, did not constitute an actual ED claim.

**2. Divorce—equitable distribution—value of marital home—evidentiary support**

In an equitable distribution action, the trial court abused its discretion by relying on a tax value when determining the post-separation passive increase in value of the marital home. Tax value listings are not competent evidence of a property's value, and in this case, the tax value was apparently never introduced by either party, precluding any opportunity for an objection. The court's order was vacated and the matter remanded for the trial court to reconsider its finding on the marital home value in light of the actual record evidence.

**3. Appeal and Error—preservation of issues—hearsay evidence—objection on other grounds—no ruling obtained**

In an equitable distribution action, a wife failed to preserve for appellate review the issue of whether the trial court erred by allowing hearsay evidence of a retirement plan valuation, because the wife objected to the evidence on different grounds before the trial court and failed to obtain a ruling on the objection she did lodge.

Appeal by Plaintiff from judgment entered 21 December 2018 and from order entered 18 September 2018 by Judge William G. Hamby, Jr., in Cabarrus County District Court. Heard in the Court of Appeals 19 February 2020.

*Plumides, Romano, Johnson, & Cacheris, P.C., by Richard B. Johnson, for Plaintiff-Appellant.*

**BEST v. STATON**

[271 N.C. App. 181 (2020)]

*No brief filed for Defendant-Appellee.*

DILLON, Judge.

Plaintiff appeals from an Order Dismissing Plaintiff's Claim for Equitable Distribution and Denying Plaintiff's Motion to Dismiss Defendant's Claim for Equitable Distribution and from Judgment of Equitable Distribution.

### I. Background

On 25 April 2009, Defendant Randall Staton ("Husband") and Plaintiff Kimberly Best ("Wife") were married. In November 2016, Husband and Wife officially separated.

In this action, Husband and Wife each filed a claim seeking equitable distribution. Wife filed her claim for equitable distribution three months *before* the parties separated. One month before the parties separated, Husband filed a responsive pleading, which included his *statement of intent* to file a claim for equitable distribution. Then, a month *after* the parties separated, Husband filed his counterclaim for equitable distribution.

Husband and Wife each moved to dismiss the other's claim for equitable distribution. The trial court granted Husband's motion and denied Wife's motion, reasoning that because Wife's claim was filed before the parties' date of separation, it lacked jurisdiction over *her* claim.

Later, in December 2018, the trial court entered a Judgment of Equitable Distribution based on Husband's claim.

### II. Analysis

Wife makes three arguments on appeal, which we address in turn.

#### A. Subject Matter Jurisdiction

[1] First, Wife argues that the trial court did not have subject matter jurisdiction over Husband's equitable distribution claim. We disagree and conclude that the trial court had jurisdiction over that claim.

Whether a trial court has subject matter jurisdiction is a question of law, reviewed *de novo* on appeal. *Azure Dolphin, LLC v. Barton*, 371 N.C. 579, 594, 821 S.E.2d 711, 722 (2018).

Our courts have consistently found there to be no subject matter jurisdiction where a party files an equitable distribution claim *prior* to the date of the couple's separation. *See, e.g., Atkinson v. Atkinson*,



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350 N.C. 590, 590, 516 S.E.2d 381, 381 (1999) (per curiam). However, our Court has found subject matter jurisdiction over a defendant's counterclaim for equitable distribution filed after separation though plaintiff filed her complaint for equitable distribution before the date of separation. *Gurganus v. Gurganus*, 252 N.C. App 1, 4-5, 796 S.E.2d 811, 814 (2017).

Wife argues that Husband's statement in his responsive pleading filed a month before separation was, in effect, a claim for equitable distribution. We disagree. Husband did not pray for equitable distribution in that pleading, but rather simply prayed that he be allowed to file such claim when the parties separated. He specifically requested to "*be allowed to file for equitable distribution upon separation of the parties or a ruling on the Divorce from Bed and Board.*" (Emphasis added).

Wife, though, contends that this case is controlled by our decision in *Coleman v. Coleman*, 182 N.C. App. 25, 641 S.E.2d 332 (2007). In that case, we determined that a counterclaim that "hereby *requests and reserves* the right for equitable distribution" was a valid equitable distribution claim. 182 N.C. App. at 26, 641 S.E.2d at 334 (emphasis added). We held that the defendant's "request" was "sufficient to put [p]laintiff on notice that [d]efendant was [presently] asking the court to equitably distribute the parties' marital and divisible property[.]" *Id.* at 29, 641 S.E.2d at 336. Our Court concluded that the use of the word "request" showed that "[t]he d]efendant did not merely assert that she intended to file a claim for equitable distribution . . . at some indefinite time in the future." *Id.* at 30, 641 S.E.2d at 337.

But Husband's language in his initial pleading is different. Husband merely expressed an intent to file an equitable distribution claim in the future "upon separation of the parties[.]" Husband's did not pray for equitable distribution until after the couple's date of separation. Therefore, we conclude that the trial court had subject matter jurisdiction over Husband's equitable distribution claim.

**B. Property Value of Marital Home**

**[2]** Wife next argues that the trial court abused its discretion when it determined on its own that the marital home had a property value increase of \$23,700 from the date of separation to the date of the hearing, based on the property's tax value.

In its order, the trial court noted that the parties agreed that the marital home had a net value *at the time of separation* of \$91,195. The trial court then made findings which generally reflected this value, finding a gross value of \$352,000 and a debt of \$260,805 at the time of separation

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(for a net value of \$91,195). However, the trial court found that *after* the date of separation, the value of the marital home passively increased in value by \$23,700:

Item I-8 is the passive increase in the value of the marital residence, which the Court determines *from the public records* to be \$23,700, in the absence of any other credible evidence of current valuation, leaving the residence with a current valuation of \$275,700 [sic] as opposed to the valuation of \$252,000 [sic] at the time of separation.

Wife, though, states in her brief that neither party offered the tax value into evidence to show a passive increase in the home value. As explained below, tax value evidence is incompetent to prove value, and it would be an abuse of discretion for a trial court to take judicial notice of and rely upon a tax value to support a finding. Husband has not filed an appellee's brief. The record is rather voluminous, and our review has not uncovered a point in the proceeding before the trial court where the tax value was offered by either party as evidence to prove a passive increase in value.

The tax value – that is, the value assigned by the county in assessing *ad valorem* taxes against real estate – is not *competent* evidence of a property's value. *See Mfg. Co. v. R.R.*, 222 N.C. 330, 332, 23 S.E.2d 32, 36 (1942) (emphasis added) (“The rule with us, ordinarily, is that evidence of tax value listings on real estate is not competent on an issue of valuation[.]”). This is so because, as our Supreme Court has explained, “in the valuation of [ ] land for taxation the owner is not consulted . . . It is well understood that it is the custom of the assessors to fix a uniform rather than an actual valuation.” *Bunn v. Harris*, 216 N.C. 366, 373, 5 S.E.2d 149, 153 (1939). We note, though, that the tax value of real property “may be considered by the fact-finder *if its introduction is not properly objected to.*” *Edwards v. Edwards*, 251 N.C. App. 549, 551, 795 S.E.2d 823, 825 (2017) (emphasis added).

Though a trial court is vested with broad discretion in ordering equitable distribution, *Wiencek-Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992), we hold that it is an abuse of discretion for a trial court rely on incompetent evidence that was not introduced into evidence by either party. As to this issue, we direct the trial court to act as indicated in the Conclusion section below.

### C. Plaintiff's Consolidated Judicial Retirement Plan

**[3]** Finally, Wife argues that the trial court abused its discretion when it admitted hearsay evidence of Wife's consolidated judicial retirement

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plan. For the following reasons, we hold that Wife has failed to preserve this issue for our review.

Our Rules of Appellate Procedure state that “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). Rule 10 also requires that the complaining party “obtain a ruling upon the party’s request, objection, or motion.” *Id.*

Wife argues on appeal that the trial court erred by admitting into evidence a valuation of her retirement plan and an affidavit from the expert who valued it because “[t]he valuation and affidavit do not fall under any of the exceptions of Rule 803.” However, Wife did not object at trial to the admission of this evidence on hearsay grounds. Furthermore, although Wife objected to the admission of the valuation and affidavit based on a violation of deadlines set in a pretrial order, Wife failed to obtain a ruling upon her objection:

[Husband’s Counsel:] And Your Honor, along with that, if I may ... admit the affidavit of Ann Marie Joseph along with that - -

[Wife’s Counsel:] Objection, I’ve never seen the affidavit. Didn’t even know it existed until a few minutes ago. And objection, uh, note - - I’d ask the court to note my exception to Number 15.

[Judge:] Absolutely.

[Wife’s Counsel:] And Your Honor, may we approach? (Inaudible – 03:12:30) objection with the exception to your ruling.

[Judge:] Absolutely.

The parties continued to question the witness following this interaction, but the judge never ruled on Wife’s objection and Wife never sought a ruling. Thus, Wife has failed to preserve this issue for our review.

### III. Conclusion

We hold that the trial court had subject matter jurisdiction over Husband’s equitable distribution claim.

Regarding the trial court’s reliance on the tax value to support its finding of a post-separation, passive increase in the value of the marital

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home, we have been unable to locate anything in the record indicating that either party offered the tax value as evidence for this purpose. And Husband has not filed an appellee's brief to counter Wife's contention that no such evidence was offered. Therefore, we must vacate and remand the Judgment of Equitable Distribution.

On remand, the trial court must reconsider its finding regarding the post-separation, passive increase in value of the marital home. If the record, indeed, shows that the tax value was offered as evidence of a passive increase and if this evidence was not objected to, then we direct the trial court to re-enter its judgment with a cite from the record of that evidence. Otherwise, the trial court may make a new finding of a passive increase (or decrease) based on any competent or unobjected-to incompetent evidence in the record. But if there is no such evidence in the record, then the trial court shall strike its finding regarding the passive increase in value of the marital home. If the trial court modifies its finding regarding the passive increase, the trial court shall then modify the remainder of the order, if necessary, to achieve a distribution that it determines to be equitable.

VACATED AND REMANDED.

Judges BERGER and COLLINS concur.

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IN THE MATTER OF J.M.

No. COA19-421

Filed 5 May 2020

**1. Child Abuse, Dependency, and Neglect—permanency planning order—waiver of future six-month review hearings—sufficiency of the evidence**

The trial court's waiver of future six-month review hearings was supported by clear, cogent, and convincing evidence of the factors required by N.C.G.S. § 7B-906.1(n) where the evidence showed respondent-mother had been unable to adequately care for her children without additional supervision and she routinely made poor decisions—including feeding her children large amounts of sugary food despite their need for significant dental work, showing three-year-old J.M. a graphic picture, and asking J.M. to watch over a baby while she attended to another child.

## IN RE J.M.

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**2. Child Abuse, Dependency, and Neglect—permanency planning order—unfit parent—sufficiency of the evidence**

The trial court's finding that respondent-mother was an unfit parent was supported by clear, cogent, and convincing evidence where the evidence showed that over a three-year period respondent consistently exhibited concerning behavior when caring for her children, she hit one child with a broomstick, when her children visited she often lost track of them and needed redirection to manage the children's behavior, she directed the children to sit and watch television extensively, and she allowed three-year-old J.M. to spend excessive amounts of time on a phone playing video games.

**3. Child Abuse, Dependency, and Neglect—permanency planning hearing—appointment as guardians—understanding of legal significance—sufficiency of findings**

Where the trial court found that the foster parents were committed to providing for the child during her minority and beyond and were willing to become parties to this action, and where the foster parents testified they understood they would be responsible for the care and expenses and medical and legal decisions for the child until she reached the age of majority, the trial court performed its duty under N.C.G.S. § 7B-600(c) in verifying that the foster parents understood the legal significance of their appointment as guardians.

**4. Child Abuse, Dependency, and Neglect—permanency planning hearing—ceasing reunification efforts—required findings**

The trial court's guardianship order ceasing reunification efforts with respondent-mother was vacated and remanded for additional findings where the order did not make findings required by N.C.G.S. § 7B-906.2(d) regarding whether respondent demonstrated a lack of success in participating or cooperating with the Wake County Human Services Department and the guardian ad litem or regarding whether respondent remained available to the court, the department, or the guardian ad litem.

Appeal by Respondent Mother from order entered 16 January 2019 by Judge Monica M. Bousman in Wake County District Court. Heard in the Court of Appeals 18 February 2020.

*Assistant County Attorney Julia B. Southwick for Petitioner-Appellee Wake County Human Services.*

*Christopher M. Watford for Respondent Appellant Mother.*

## IN RE J.M.

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*Battle, Winslow, Scott & Wiley, PA, by M. Greg Crumpler, and Senior Deputy County Attorney Roger A. Askew for guardian ad litem.*

INMAN, Judge.

Respondent Jessica Hayes (“Mother”) appeals the district court’s permanency planning order, pursuant to N.C. Gen. Stat. § 7B-1001(a)(4), placing guardianship of her infant daughter Jane<sup>1</sup> with foster parents.<sup>2</sup> Mother contends the trial court erred in: (1) waiving further review hearings; (2) finding that she was an unfit parent; (3) failing to make an evidentiary finding that the foster parents understood the legal significance of their appointment as guardians of Jane; and (4) ceasing reunification efforts without first making the necessary findings of fact.

After careful review, we hold that the trial court properly waived further review hearings, found that Mother is an unfit parent, and verified that Jane’s foster parents understood their appointment as guardians. But we vacate the trial court’s order and remand for the trial court to make the necessary findings in ceasing reunification efforts.

### **I. FACTUAL AND PROCEDURAL BACKGROUND**

The record reflects the following facts:

On 15 January 2016, Wake County Human Services (“WCHS”) filed a juvenile petition alleging Mother was neglecting her four young children, nine-year old Damon, four-year old Joanne, two-year old Jake, and six-month old Jane. WCHS had been involved with Mother and the children for the last two years by that time. In December 2014, Mother created a safety plan that stemmed from instances of domestic violence between her and the father of the three younger children (“Father”). In May 2015, safety agreements were created to prevent Father and the maternal grandfather from contacting the children due to reported instances of sexual abuse.

In early January 2016, a report indicated that Father had been seen around Mother’s home with the children despite the safety plans being in place. Mother resided at her sister’s residence for a short time and lived in a hotel before Father eventually located her and the children and stole her car and phone. Although Mother was able to retrieve

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1. We employ pseudonyms to preserve the anonymity of the juveniles.

2. Jane’s father does not appeal.

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her stolen property, Father severely assaulted her, causing her to file a police report for domestic violence. Mother and the children subsequently became homeless days before WCHS filed its juvenile petition. The children were then placed in non-secure custody with WCHS the day of the petition.

On 28 March 2016, the court adjudicated all four children neglected and kept non-secure custody with WCHS. WCHS placed Joanne and Jake in a licensed foster home together, while another foster family cared for Jane. Damon has mental health issues and was placed in a psychiatric hospital. The trial court ordered Mother to comply with a family services agreement, consisting of: obtaining and maintaining sufficient housing; maintaining adequate employment; submitting to a parenting evaluation and attending parenting classes; submitting to a domestic violence evaluation and participating in counseling; regularly notifying the social worker of any change in circumstances; and following the visitation agreement. Mother was allowed to visit the children once per week for one hour.

Over the next two years, the trial court continually attempted to reunify the children with Mother, with adoption being a secondary option. The trial court found that Mother, in 2016, informed Damon that his father died without consulting his therapist and posted a video on Facebook of her engaging in a fight, while she was pregnant, with another pregnant woman. Mother received an unrelated court settlement and, instead of paying child support, bought a vehicle and vacationed in the Bahamas. Mother also bought shoes for the children but did not allow them to keep them, telling them “that the sneakers would be for when they ‘came home.’”

Despite these shortcomings, the trial court also found that Mother actively participated in her case plan, maintained housing, regularly visited the children, gained employment, and progressed in her parenting skills.

Mother gave birth to her fifth child, Danielle, in November 2016, which limited the hours she worked.<sup>3</sup> Beginning in July 2017, Mother transitioned from supervised to unsupervised and overnight visits with Joanne, Jake, and Jane.

However, by the fifth review hearing, on 29 January 2018, more than two years after WCHS’ juvenile petition, the trial court still had concerns about Mother’s ability to successfully parent her children. Mother had

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3. WCHS did not petition for custody of Danielle, who has a different father.

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regressed to supervised visits because she unsatisfactorily cared for the children without a parenting coach or social worker present. Joanne told WCHS that she saw Mother hit Jake on the head with a broom, but Mother denied the act ever occurred.<sup>4</sup> Mother told the children that they were coming home soon, that their foster parents did not love them, and that the foster parents cared for the children because they were being paid. The trial court changed the primary plan to adoption and ordered reunification as a secondary plan.

In November 2017, despite having her electricity turned off because she said she could not pay the bill, Mother hosted a first birthday party for Danielle at an amusement park and “assist[ed] her sister with her new born baby.” Mother still failed to acknowledge that Damon—who had recently been moved to a group home—suffered from mental illness and needed extensive treatment. Mother refused to allow the children’s guardian *ad litem* to enter her residence and observe her visits with them.

Following the sixth review hearing in July 2018, the trial court kept in place the permanent plan of adoption with a secondary plan of reunification. The trial court noted that Mother “continue[d] to require significant monitoring during her visits with the children” and was “fail[ing] to provide appropriate supervision for all of the children when the visits occur in her home.” Although Mother claimed she was earning \$477 a week, she failed to provide proof of income. Mother admitted that “many individuals” help care for Danielle because “she doesn’t have a consistent person to provide care for her.” Mother had reached the maximum amount of sessions with a parenting coach available to her. At one point, Mother visited Damon unannounced and falsely claimed that she had approval to be there.

By December 2018, nearly three years after the four children were removed from Mother’s home, and despite protracted juvenile proceedings and supervision, WCHS observed that Mother continued to need supervision and re-direction when visiting the children and frequently exhibited poor decision-making skills. By that time, Jane had developed a significant attachment to her foster parents and often secluded herself when visiting Mother and her siblings.

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4. Harnett County screened the report and concluded that “there was no indication that it occurred by any other way than accidental means, and there were no injuries.” In a later review hearing, Mother testified it was an accident.



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On 16 January 2019, following another review hearing, the trial court awarded guardianship of Jane to her foster parents and waived further review hearings.<sup>5</sup>

Mother appeals.

## II. ANALYSIS

### A. *Waiving Review Hearings*

[1] Mother first argues that the trial court erroneously waived future review hearings because the evidence was insufficient to support the court’s necessary findings. We disagree.

In juvenile proceedings, the trial court must conduct review hearings every six months or earlier “to review the progress made in finalizing the permanent plan for the juvenile, or if necessary, to make a new permanent plan for the juvenile.” N.C. Gen. Stat. § 7B-906.1(a) (2017). The trial court may waive future review hearings if it “finds by clear, cogent, and convincing evidence each of the following”:

- (1) The juvenile has resided in the placement for a period of at least one year.
- (2) The placement is stable and continuation of the placement is in the juvenile’s best interests.
- (3) Neither the juvenile’s best interests nor the rights of any party require that review hearings be held every six months.
- (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court’s own motion.
- (5) The court order has designated the relative or other suitable person as the juvenile’s permanent custodian or guardian of the person.

*Id.* §§ 7B-906.1(n)(1)-(5). The trial court cannot “waive or refuse to conduct a review hearing if a party files a motion seeking the review.” *Id.* § 7B-906.1(n).

Mother concedes that the trial court made the statutory findings of fact, but contends that no evidence supports some of those findings. Finding 21 provides that “[n]either the best interests . . . of any party require that review hearings be held every six (6) months.” The social

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5. The record does not disclose the updated statuses of Mother’s remaining children in WCHS custody.

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worker for WCHS, Christina Dillahunt (“Dillahunt”), testified at the most recent review hearing that, over the past three years since WCHS obtained non-secure custody, Mother has been unable to adequately care for the children without additional supervision and proper direction. Dillahunt testified, for example, that Mother routinely made poor decisions while monitoring the children, including feeding the children large amounts of sugary food, despite their needing significant dental work; attempted to show Jane a graphic picture of Mother’s sister’s vehicle crash; and asked Jane, then age three, to watch Danielle while she attended to another child. Mother does not contest the finding that “it does not appear likely that either parent will be in a position to safely parent [Jane] with the next six (6) months.” We hold this evidence provides, clear, cogent, and convincing support for the factors required by Section 7B-906.1(n) and the trial court’s waiver of future six-month review hearings.

Finding 22 states that “[a]ll of the parties are aware that the matter may be reviewed upon motion for review of any party.” The hearing transcript reveals that the trial court informed the parties and their counsel who were present that “the matter may be brought before the Court for review at any time by filing a motion for review or on the court’s own motion.” Thus, the transcript establishes that the parties were aware that the matter could be reviewed upon a motion by any party, notwithstanding the trial court’s waiver of further periodic review hearings.

*B. Fitness as a Parent*

[2] Mother next argues that the trial court’s finding that she was unfit as a parent was not supported by the evidence and violated her constitutional right as a parent. We disagree.

“A natural parent’s constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child.” *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). However, “the parent may no longer enjoy a paramount status if his or her conduct is inconsistent with this presumption or if he or she fails to shoulder the responsibilities that are attendant to rearing a child.” *Id.*

“[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent’s conduct is inconsistent with his or her constitutionally protected status.”

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*David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005). “Unfitness, neglect, and abandonment clearly constitute conduct inconsistent with the protected status parents may enjoy.” *Price*, 346 N.C. at 79, 484 S.E.2d at 534. “Therefore, the trial court must clearly address whether [the parent] is unfit as a parent or if her conduct has been inconsistent with her constitutionally protected status as a parent, should the trial court . . . consider granting custody or guardianship to a nonparent.” *In re J.L.*, \_\_ N.C. App. \_\_, \_\_, 826 S.E.2d 258, 266 (2019) (quotation marks, citations, and alterations omitted); *see also In re D.A.*, 258 N.C. App. 247, 250, 811 S.E.2d 729, 732 (2018) (requiring the trial court “to find that the parents were either unfit or had acted inconsistently with their constitutionally protected status as parents”).

At the end of the hearing, the trial court made an oral finding from the bench that “both parents are still unfit and have acted in a manner inconsistent with their constitutionally protected right as a parent.” In its written order, the trial court found that “[b]oth parents are acting inconsistently with the health and safety of the child and are unfit to have custody of the child.”

A trial court’s finding that a parent is unfit will be affirmed on appeal if we conclude that the finding is supported by clear and convincing evidence. *See, e.g., Adams v. Tessener*, 354 N.C. 57, 66, 550 S.E.2d 499, 505 (2001) (concluding, to affirm the trial court’s award of custody to grandparents, that “the evidence of record constitutes clear and convincing proof that [the parent’s] conduct was inconsistent with his right to custody of the child”).

The trial court made the following pertinent findings of fact:

6. The mother has not been able to adequately demonstrate the ability to parent the child. She continues to require significant monitoring during her visits with the children. She continues to fail to demonstrate the ability to safely parent the children without the intervention of the social worker. The mother has allowed the children to spend a great deal of time during the visits playing games on the mother’s cell phone. The mother’s behavior in visits was consistent with the mother failing to provide consistent and appropriate supervision for the child and her siblings when the visits occurred in her home. The mother may have completed the services which have been ordered over the nearly three (3) year period the child has been in custody but has not sufficiently demonstrated a change

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in her approach to parenting such that the child would be safe and have her needs met in the mother's care. . . .

11. Neither parent has been able to demonstrate an ability to safely care for the child such that the Court would be able to approve unsupervised visitation. The mother was awarded unsupervised visits at one time but was unable to maintain that level due to an incident in which an older sibling was hit in the forehead with a broom handle by the mother. . . .

19. The return of the child to [Mother's custody] would be contrary to the child's health and safety.

Dillahunt, the social worker responsible for monitoring Mother's contact with the children, testified as follows:

- Over a period of nearly three years, Mother consistently exhibited concerning behavior when caring for and visiting Jane and the other children.
- Mother hit Jake on the forehead with a broomstick.
- Mother frequently lost track of the children when they visited and needed redirection to effectively manage the children's behaviors and how to speak with them.
- When the children visited with Mother, she directed them to sit and watch television extensively, and allowed Jane, not yet four years old, to "spend[] excessive amount[s] of time on [Mother's] phone playing video games."

In light of the above evidence, we hold that the trial court did not err in determining that Mother was unfit to parent Jane.

To the extent Mother argues that her positive actions toward reunification were not given sufficient weight by the trial court, we emphasize that "[i]t is not the function of this Court to reweigh the evidence on appeal." *In re T.H. & M.H.*, \_\_ N.C. App. \_\_, \_\_, 832 S.E.2d 162, 166 (2019) (quotations marks and citation omitted).

Although Mother argues that other findings of fact are unsupported by sufficient evidence, we need not address this argument, because the findings we have already concluded are supported by clear and convincing evidence are sufficient to support the trial court's ultimate finding that Mother is unfit to parent Jane. *See, e.g., In re P.T.W.*, 250 N.C. App. 589, 602, 794 S.E.2d 843, 852 (2016) (citation omitted).

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*C. Verification of Guardianship*

[3] Mother asserts that the trial court awarded guardianship to Jane's foster parents without making an evidentiary finding that they understood the legal significance of their appointment. We hold that the trial court performed its statutory duty.

Before a trial court can appoint a guardian, it must "verify that the person being appointed as guardian of the juvenile understands the legal significance of the appointment and will have adequate resources to care appropriately for the juvenile." N.C. Gen. Stat. § 7B-600(c) (2017); *see also* N.C. Gen. Stat. § 7B-906.1(j) (2017). The trial court does not need to "make any specific findings in order to make the verification." *In re J.E.*, 182 N.C. App. 612, 616-17, 643 S.E.2d 70, 73 (2007). "It is sufficient that the court receives and considers evidence that the guardians understand the legal significance of the guardianship." *In re L.M.*, 238 N.C. App. 345, 347, 767 S.E.2d 430, 432 (2014) (citation omitted).

Here, the foster parents testified at the hearing as to the following:

[Trial Court]. Do you understand that, as the guardian, you would be—you would have the care, custody, and control of the child or could arrange a suitable placement for the child? Do you understand that?

[Foster Father]. Yes.

[Trial Court]. Do you understand that you would represent the child in legal actions before the Court?

[Foster Father]. Yes.

[Trial Court]. Do you understand—I'm not saying you would, but do you understand you could consent to marriage, enlisting in the armed forces, or enrollment in school?

[Foster Father]. Yes.

[Trial Court]. Do you understand that you could also consent to any necessary remedial, psychological, medical, or surgical treatment for the child?

[Foster Father]. Yes.

[Trial Court]. Do you understand that your authority as guardian shall continue until guardianship is terminated by a court order, until the child is emancipated

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pursuant to a certain legal action or until she reached the age of majority?

[Foster Father]. Yes.

[Trial Court]. Do you understand that the Court would only terminate the guardianship if the Court found that the relationship between you and the child was no longer in the child's best interest, you became unfit, that you neglected your duties as guardian, or that you were unwilling or unable to continue assuming the guardian's duties?

[Foster Father]. Yes.

[Trial Court]. And are you willing and able to become a guardian?

[Foster Father]. Yes.

[Trial Court]. Are you willing to follow the Court's order regarding visitation with the parents?

[Foster Father]. Yes.

[Trial Court]. Are you willing to either—depending on what the Court would decide at some point, supervise or monitor the visitation or arrange for pick-up and drop-off if it ever became unsupervised that either you would do it, your wife would do it, or you would have someone that you designated do it?

[Foster Father]. Yes.

[Trial Court]. You are willing to accommodate that?

[Foster Father]. Yes, we will.

....

[Direct Examination]. Okay. And did you hear everything your—

[Foster Mother]. I did.

[Direct Examination]. —husband testified to? And do you agree with all of that?

[Foster Mother]. Completely, yes.

[Direct Examination]. Do you understand the same things that the Judge has asked him, as far as your obligations?

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[Foster Mother]. I do.

[Direct Examination]. And are you also willing to -- willing and able to provide for this child as her guardian?

[Foster Mother]. Completely, yes.

[Direct Examination]. Okay. And do you and your husband both care for her?

[Foster Mother]. Completely.

[Direct Examination]. Do you have—what type of emotions do you have with connection to her?

[Foster Mother]. A little too much.

[Direct Examination]. Okay. And you consider her as part of your family?

[Foster Mother]. Yes. . . .

[Cross Examination]. Will you provide a safe and loving home for her until she reaches the age of majority?

[Foster Mother]. Easily, yes.

[Cross Examination]. And meet all of her needs?

[Foster Mother]. Yes.

Dillahunt, the social worker, also testified that the foster parents understood their responsibilities as guardians and indicated their “desire to have [Jane] treated exactly as their biological children.”

In its order, the trial court found that the foster parents “are committed to providing for the child for the remainder of her minority and beyond” and “are willing to become parties to this action.” The above evidence and findings show that the trial court performed its duty under Section 7B-600(c) in verifying that Jane’s foster parents understood the legal significance of their appointment as guardians. We need not review whether the trial court verified that the foster parents have the financial resources to care for Jane, as Mother does not argue that on appeal.

*D. Reunification Efforts*

[4] Mother finally argues that the trial court did not make all of the required findings of fact before ceasing reunification efforts. We agree and vacate the trial court’s guardianship order and remand for the trial court to make the necessary findings.

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[271 N.C. App. 186 (2020)]

“This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court’s conclusions, and whether the trial court abused its discretion with respect to disposition.” *In re C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007) (citations omitted).

A trial court may cease reunification efforts following any permanency planning hearing if it “makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile’s health or safety.” N.C. Gen. Stat. § 7B-906.2(b) (2017). In determining that efforts would be unsuccessful or contrary to the juvenile’s well-being, the court must make written findings “demonstrat[ing] lack of success” as to each of the following:

- (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
- (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
- (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
- (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

*Id.* § 7B-906.2(d).

Here, the trial court made limited findings relating only to portions of the factors listed above. The guardian *ad litem* concedes that the trial court made no finding regarding whether Mother demonstrated a lack of success in participating or cooperating with WCHS and the guardian *ad litem* or whether she has remained available to the court, WCHS, or the guardian *ad litem*.

Because “the trial court failed to make the requisite findings required to cease reunification efforts” under Section 7B-906.2(d), *In re D.A.*, 258 N.C. App. at 254, 811 S.E.2d at 734, we vacate the trial court’s order and remand for it to make those findings. Although Mother also argues that the trial court’s findings were not supported by credible evidence, we will not review that argument as we already determined its findings are deficient.



IN RE N.N.B.

[271 N.C. App. 199 (2020)]

**III. CONCLUSION**

We affirm the trial court's decision to waive further review hearings and hold that it properly found Mother is an unfit parent and that it performed its statutory duty in verifying that Jane's foster parents understood the legal significance of their appointment as guardians. We vacate and remand the trial court's guardianship order for it to make the required statutory findings before ceasing reunification efforts.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges STROUD and YOUNG concur.

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IN THE MATTER OF N.N.B.

No. COA19-261

Filed 5 May 2020

**Termination of Parental Rights—incarcerated parent—dependent juvenile—alternative child care arrangement**

The trial court did not err by terminating the parental rights of respondent-father on the ground the juvenile was a dependent juvenile where respondent was incarcerated for a term of 461 years and lacked an appropriate alternative child care arrangement because his mother and sister were not appropriate placements due to the juvenile's substantial need for psychiatric care.

Appeal by respondent from order entered on or about 6 November 2018 by Judge Tonia A. Cutchin in District Court, Guilford County. Heard in the Court of Appeals 18 February 2020.

*Mercedes O. Chut, for petitioner-appellee Guilford County Department of Health and Human Services.*

*David A. Perez for respondent-appellant father.*

*Parker Poe Adams & Bernstein LLP, by Lisa Sperber, for guardian ad litem.*

STROUD, Judge.

**IN RE N.N.B.**

[271 N.C. App. 199 (2020)]

Respondent appeals termination of his parental rights. Because the evidence supports the trial court's finding of fact that respondent lacks an appropriate alternative child care arrangement, it did not err by concluding that Neal is a dependent juvenile or by terminating respondent's parental rights on this basis. We affirm.

**I. Background**

On 30 May 2017, the Guilford County Department of Health and Human Services ("DHHS") filed a petition alleging that Neal,<sup>1</sup> age 11 at the time of the petition, was a neglected and dependent juvenile. The allegations in the petition focus on Neal's mental health issues exhibited in his problematic behaviors which include suicidal ideations, harming animals, and starting fires. This appeal concerns only Neal's father, respondent, as Neal's mother relinquished her parental rights in 2018.

Respondent is incarcerated serving a term of 461 years for rape, burglary, and other crimes. Respondent has not seen Neal since 2012 even though he was not incarcerated until 2014. Ultimately, respondent's rights were terminated based on failure to properly establish paternity, failure to provide proper care and supervision, and abandonment. Respondent appeals.

**II. Failure to Provide Proper Care and Supervision**

Respondent challenges each ground of termination.

A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage. A different standard of review applies to each stage. In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists. The standard for appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether those findings of fact support its conclusions of law. Clear, cogent, and convincing describes an evidentiary standard stricter than a preponderance of the evidence, but less stringent than proof beyond a reasonable doubt.

If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under

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1. We have used a pseudonym to protect the identity of the juvenile.

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[271 N.C. App. 199 (2020)]

N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child. The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights.

*In re D.R.B.*, 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). “Unchallenged findings are binding on appeal.” *In re C.B.*, 245 N.C. App. 197, 199, 783 S.E.2d 206, 208 (2016).

North Carolina General Statute § 7B-1111 provides,

(a) The court may terminate the parental rights upon a finding of one or more of the following:

- (6) That the parent is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonable probability that the incapability will continue for the foreseeable future. Incapability under this subdivision may be the result of substance abuse, intellectual disability, mental illness, organic brain syndrome, or any other cause or condition that renders the parent unable or unavailable to parent the juvenile and the parent lacks an appropriate alternative child care arrangement.

N.C. Gen. Stat. § 7B-1111 (2017).

A dependent child is defined as a juvenile in need of assistance or placement because the juvenile’s parent, guardian, or custodian is unable to provide for the care or supervision and lacks an appropriate alternative child care arrangement. Under this definition, the trial court must address both (1) the parent’s ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements.

*In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005) (citation, quotation marks, ellipses, and brackets omitted).

Here, respondent concedes that due to his lengthy incarceration he cannot provide care or supervision but contends that he proposed two

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relative placements – his mother and sister. Respondent contends “[t]he real issue before this Court is whether . . . [he] lacked an ‘appropriate alternative child care arrangement.’” Respondent also does not challenge the trial court’s findings of fact regarding his mother and sister. Respondent’s mother “when contacted . . . stated she had failing health and was residing in a retirement community that did not allow children.” The trial court found respondent’s sister was not a “viable” option as Neal had been in level IV psychiatric treatment and had been moved to a level III group home. DHHS determined, and the trial court found, that no relative placement would be appropriate at this time because of the level of care Neal requires. Again, respondent does not challenge these findings of fact as unsupported by the evidence but contends “[t]his matter is unusual in that no relative placement could have been considered immediately appropriate as of the termination hearing.”

Respondent notes his sister had been Neal’s primary caregiver from his birth until 2008, when she moved to Georgia. Because respondent’s sister lived in Georgia, an Interstate Compact on the Placement of Children (“ICPC”) home study was required before Neal could be placed in her home. DHHS completed an ICPC Case Manager Statement of Interest form for respondent’s sister and allowed her to have weekly telephone contact with Neal, continuing up to the time of the termination hearing. Respondent further explains that the trial court had also ordered DHHS to initiate the ICPC home study for his sister. But at that time, Neal was placed in Level IV Psychiatric Residential Treatment Facility (“PRTF”). When DHHS contacted the ICPC office, they asked that DHHS first determine the discharge plan for Neal from the PRTF. The PRTF recommended that Neal transition to a Level III group home and did not recommend placement with a relative because of Neal’s substantial needs for psychiatric care. DHHS then suspended its plan to place Neal with respondent’s sister, although DHHS still had plans to submit the ICPC request if a relative placement was ever deemed appropriate for Neal. Thus, respondent argues that he offered his sister as an appropriate child care arrangement but he was not allowed to have “any input or involvement whatsoever in the decision to transition Neal from a PRTF to a Level III group home.” Respondent contends that even if he had not been incarcerated, “there is no reason to believe he would have had any more actual involvement as to the placement of his child in a level III group than he had while incarcerated.”

Respondent cites to *In re C.B.*, where the child’s mother did not propose appropriate child care alternatives and was uncooperative with DSS’s attempts to provide mental health services for the child. 245 N.C.

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App. at 211, 783 S.E.2d at 216. But *C.B.* is inapposite to this case. *See id.*, 245 N.C. App. 197, 783 S.E.2d 206.

In *C.B.*, the child suffered from severe mental health problems which resulted in “aggressive, assaultive, dangerous behaviors[.]” *Id.* at 203, 783 S.E.2d at 211. The child had been hospitalized several times, but the mother minimized the problem and claimed the child just had “seizures” although there was no evidence of any seizure disorder. *Id.* at 205, 783 S.E.2d at 212. The mother repeatedly refused to participate in intensive in-home treatment for the child because she believed she could handle the child on her own. *See id.* In *C.B.*, the mother challenged the trial court’s findings of the severity of the child’s mental needs and contended she was able to care for the child properly herself. *See id.* at 206, 783 S.E.2d at 212.

Respondent does not challenge the trial court’s findings regarding Neal’s serious mental health issues or need for a Level III placement. Respondent contends only that his sister is an “appropriate” placement in that she is available and willing and has a close relationship with Neal. But respondent’s sister is not an “appropriate” placement for Neal because of his psychiatric needs. Respondent’s sister may well be an “appropriate” placement for a child who does not require such a high level of care, but not for Neal.

Accordingly, the trial court did not err in concluding that Neal is a dependent juvenile and that respondent’s rights should be terminated under North Carolina General Statute § 7B-1111(a)(6). This argument is overruled. As we have found one ground for termination, we need not address the others. *See In re B.S.D.S.*, 163 N.C. App. 540, 546, 594 S.E.2d 89, 93–94 (2004) (“Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground[s] . . . found by the trial court.”).

## III. Conclusion

For the foregoing reasons, we affirm.

AFFIRMED.

Judges INMAN and YOUNG concur.

## IN RE WASHINGTON CNTY. SHERIFF'S OFF.

[271 N.C. App. 204 (2020)]

IN RE WASHINGTON COUNTY SHERIFF'S OFFICE

No. COA18-653

Filed 5 May 2020

**Judges—judicial authority—advisory opinion—ex parte motion—  
no active case—disclosure of criminal investigative file**

A trial court exceeded its judicial authority by entering an advisory opinion on an ex parte motion, filed by the State and not in connection with any ongoing trial or criminal prosecution, which sought an in camera review and a determination of whether a criminal investigative file contained potentially exculpatory information subject to disclosure. The order was vacated because the court's directive to the State to disclose the file, which involved a law enforcement officer's conduct, to defendants and their counsel "in any criminal matter" in which the State intended to call the officer as a witness constituted an anticipatory and speculative judgment.

Judge BERGER dissenting.

Appeal by petitioner-appellant from orders entered 20 February and 1 March 2018 by Judge Wayland J. Sermons, Jr. in Washington County Superior Court. Heard in the Court of Appeals 28 March 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Jason P. Caccamo, for the State.*

*J. Michael McGuinness for petitioner-appellant.*

*Megan Milliken for The Southern States Police Benevolent Association and The North Carolina Police Benevolent Association, amicus curiae.*

MURPHY, Judge.

The District Attorney of Washington County ("the State") filed an Ex Parte Motion for In Camera Review in the Superior Court of Washington County "to determine whether or not [a criminal investigative file] contain[ed] potentially exculpatory information" involving Appellant "that the State would be required to disclose . . . in cases [in which] the State intends to call [Appellant] as a witness." The State's motion was not filed in correlation with any ongoing trial or criminal prosecution,

## IN RE WASHINGTON CNTY. SHERIFF'S OFF.

[271 N.C. App. 204 (2020)]

but for the purpose of determining whether the investigative file in question contained information the State would be required to disclose to potential criminal defendants in the future. The judge reviewed the file and ordered the District Attorney's Office to, "in any criminal matter wherein the State of North Carolina intends to call [Appellant] as a witness, disclose to the defendant and/or defendant's counsel the contents of" the investigative file.

On appeal, Appellant argues the judge erred in issuing the 20 February and 1 March 2018 *ex parte* orders because he was not provided notice and an opportunity to be heard. Appellant further contends that the judge erred in issuing the 1 March 2018 order because the judge (1) lacked subject matter jurisdiction to act on the State's *ex parte* motion for *in camera* review, (2) violated his procedural due process rights under the United States and North Carolina Constitutions, and (3) violated his rights to liberty and to enjoy the fruits of his labor under the North Carolina Constitution. The judge exceeded the limits of its jurisdiction by entering an advisory opinion, which is hereby vacated.

**BACKGROUND**

Washington County Sheriff's Office criminal investigative file OCA #2017-08-0026 concerned an investigation conducted in part by Appellant, a North Carolina law enforcement officer. The State filed an *Ex Parte Motion for In Camera Review of Investigative Report and for Protective Order*.

Appellant was identified in the State's motion as "a potential witness in criminal cases." The State further alleged that Appellant "may have mislead [*sic*] and deceived a superior officer[,] . . . [and] may have not been truthful and honest in the preparation of the investigative report related to his actions that may have mislead [*sic*] and deceived a superior officer." Additionally, the State alleged that it had "a sufficient basis to believe that potential impeachment or exculpatory evidence exists within OCA #2017-08-0026."<sup>1</sup>

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1. The State's motion references OCA #2017-08-0026 as an investigative file, but then alleges that the file is a personnel record and an internal affairs file. The judge's order makes the same statement. However, Appellant did not allege in any motion filed in the lower court that the file was a personnel record, nor does he argue on appeal that the criminal investigative file at issue is a personnel record that is subject to disclosure only pursuant to the terms of N.C.G.S. § 153A-98. In fact, in his brief, Appellant acknowledges that the records at issue are "investigative records involving [Appellant]." Moreover, there is no indication the file is an internal affairs file.

We note that an OCA number typically refers to the unique number assigned to criminal investigations by law enforcement agencies, and the file contained in the Record, Washington County Sheriff's Office OCA #2017-08-0026, concerned the investigation of a home invasion and shooting. Thus, we refer to the file as a criminal investigative file.

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The judge ordered the District Attorney's Office, consistent with the request contained in the motion, to submit copies of the criminal investigative file to the judge "to determine whether or not it contain[ed] potentially exculpatory information that the State would be required to disclose" in future cases. The file contained documented inconsistencies in Appellant's reports relating to the criminal investigation and his description of events to his superiors.

On 1 March 2018, following the *in camera* review, the judge entered an order with the following findings of fact:

2. That [Appellant] was an investigatin[g] officer in Washington County Sheriff's Office OCA #2017-08-0026[.]

...

5. The State has an affirmative ethical and constitutional obligation to disclose evidence favorable to a criminal defendant. . . . Counsel for the State is responsible for a failure to disclose exculpatory information in the possession of the police department, knowledge of which is imputed to the prosecutor.

The judge concluded as a matter of law that the information contained in the investigative file "contain[ed] potentially exculpatory information that the State would be required to disclose under *Brady*, *Giglio*[,] and/or *Laurie*, in cases involving [Appellant] as a witness." The judge also concluded as a matter of law that

8. The public policy concerns, and those of [Appellant], in protecting the confidentiality of this file is outweighed by the rights of criminal defendants in cases where [Appellant] is or may be a witness in accordance with *Brady*, *Giglio*[,] and *Laurie* material.

9. [T]here is a sufficient basis to believe that potential impeachment or exculpatory evidence exists within Washington County Sheriff's Office OCA #2017-08-0026[.]

The judge ordered the State to "disclose to the defendant and/or defendant's counsel the contents" of the criminal investigative file "in any criminal matter" in which the State intends to call [Appellant] as a witness. The ordered disclosure was to be made "in compliance with the State's Constitutional responsibility to disclose potentially exculpatory information."

Per the terms of the order, the State notified Appellant of the order by a letter dated 1 March 2018. On 28 March 2018, Appellant noticed his



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appeal from the judge's 20 February and 1 March 2018 orders. Appellant also filed a motion requesting the production of documents considered by the judge in issuing said orders. The judge granted Appellant's motion "on the express condition that such documents shall remain confidential between [Appellant] and his counsel." However, the judge authorized Appellant to "use [the] disclosed records in connection with any litigation arising out of the disclosure of [the] records," including the appeal now before us.

**ANALYSIS**

In the context of *Brady* and *Giglio* disclosures, trial courts have the authority to require the government to disclose exculpatory and/or impeachment evidence. *State v. Martinez*, 212 N.C. App. 661, 666, 711 S.E.2d 787, 790-91 (2011); *see also State v. Lynn*, 157 N.C. App. 217, 224, 578 S.E.2d 628, 633 (2003). However, this matter is not a situation where the judge has issued an order requiring disclosure of exculpatory or impeachment evidence in a criminal matter over which the court is *presently* presiding. Instead, the judge's order here attempts to require disclosure "in any criminal matter wherein the State of North Carolina intends to call [Appellant] as a witness" in the future. There is a fine line between declaratory judgments, which trial courts have the statutory authority to enter, and advisory opinions, which go beyond a trial court's judicial authority. *See, e.g., Lide v. Mears*, 231 N.C. 111, 117, 56 S.E.2d 404, 409 (1949) ("The Uniform Declaratory Judgment Act does not license litigants to fish in judicial ponds for legal advice."); *Town of Tryon v. Duke Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942) (noting that it is not the function of the courts "to give a purely advisory opinion which the parties might, so to speak, put on ice to be used if and when occasion might arise"). Here, the judge's order is purely advisory and therefore an improper exercise of its power. *Duke Power Co.*, 222 at 204, 22 S.E.2d at 453 (citing *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 324, 80 L. Ed. 688, 699 (1936)).

The judge's order in this matter is an anticipatory judgment providing for the contingency that Appellant is to be called as a witness by the State in a future criminal case. The judge's order requires the State to, "in any criminal matter wherein the State of North Carolina intends to call [Appellant] as a witness, disclose to the defendant and/or defendant's counsel the contents of Washington County Sheriff's Office OCA #2017-08-0026 . . . in compliance with the State's Constitutional responsibility to disclose potentially exculpatory information." Such an order is purely speculative and amounts to, using the language of our Supreme Court, "a purely advisory opinion which the parties might, so to speak,

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put on ice to be used if and when occasion might arise.” *Duke Power Co.*, 222 N.C. at 204, 22 S.E.2d at 453. Such an order exceeds the scope of the judge’s power and must be vacated.

The advisory nature of the judge’s order in this case is especially evident when we consider the alternative scenario in which it ruled the State is *not* required to disclose information contained in the investigative report in future cases. Would such a holding bind trial courts or District Attorneys from making independent *Brady* or *Giglio* determinations? Would future defendants be deprived of the opportunity to argue the exculpatory or impeachment value of the report? These questions are undoubtedly answered in the negative because in every criminal case, the prosecutor retains an “affirmative duty to disclose evidence favorable to a defendant[.]” *Kyles v. Whitley*, 514 U.S. 419, 432, 131 L. Ed. 2d 490, 505 (1995).

“The courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . . , provide for contingencies which may hereafter arise, or give abstract opinions.” *Little v. Wachovia Bank & Tr. Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960); *see also Wise v. Harrington Grove Cmty. Ass’n, Inc.*, 357 N.C. 396, 408, 584 S.E.2d 731, 740 (2003) (holding that deciding an issue not “drawn into focus by [the court] proceedings” would “render an unnecessary advisory opinion”); *In re Davis’ Custody*, 248 N.C. 423, 426, 103 S.E.2d 503, 505 (1958) (holding that a trial court “rendered an advisory opinion that [a father] shall not be bound by any order of the Domestic Relations Court . . . [regarding custody of two minors] . . . from this date forward”) (internal quotation marks omitted); *State v. Herrin*, 213 N.C. App. 68, 75, 711 S.E.2d 802, 808 (2011) (holding that a sentencing matter was not ripe for appellate review because it would arise, if at all, only if defendant was ordered by a future court to serve a consecutive sentence); *In re Wright*, 137 N.C. App. 104, 112, 527 S.E.2d 70, 75 (2000) (holding that the question of whether a punishment was cruel and unusual was not “ripe for review” because the defendant had “been neither tried nor convicted of any crime”). Here, the trial court’s order amounts to an improper advisory opinion, which must be vacated.

**CONCLUSION**

Every defendant enjoys the right to evidence in the hands of the State which may have exculpatory or impeachment value. However, here, there is no actual controversy, as there are no actual defendants on the other side. Rather, the judge’s order is an advisory opinion regarding

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the State's obligation towards purely hypothetical future defendants. The issuance of the order was not a proper exercise of its judicial power.

VACATED.

Judge DILLON concurs.

Judge BERGER dissents with a separate opinion.

BERGER, Judge, dissenting in separate opinion.

I respectfully dissent.

First, it must be noted that petitioner seeks relief through a process which currently is not established in our law. Petitioner certainly advances reasonable concerns about the potential harm that could occur for law enforcement officers wrongly identified as having been untruthful. However, petitioner's concerns, and the procedure he seeks to implement, are better vetted and established by the legislature.

As Justice Scalia noted, "the court makes an amazing amount of decisions that ought to be made by the people." Judges are low-information decision makers. *See Dep't of Homeland Sec. v. New York*, 589 U.S. \_\_\_, \_\_\_ (2020) (Gorsuch, J., concurring). We are at all times limited to the parties before us, the information they provide, and the particular facts of their case. Before us in this case, we have a law enforcement officer from Washington County, in what is essentially an *in rem* proceeding. Petitioner seeks to establish a procedure that would impact prosecutors, police chiefs, sheriffs, and judges across the State of North Carolina. Petitioner wants the benefits of a new procedure with no input from public servants whose job it is to protect the public, protect constitutional rights, and seek justice.

"[R]ecognition of a new cause of action is a policy decision which falls within the province of the legislature." *Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 656, 654 S.E.2d 76, 81 (2007) (quoting *Ipock v. Gilmore*, 85 N.C. App. 70, 73, 354 S.E.2d 315, 317 (1987)). Thus, these concerns should be addressed to the one hundred seventy men and women in our legislature. The people, through their elected representatives from across this state, would scrutinize information, arguments, and positions from all affected groups. In the long run, law enforcement officers may obtain a clear and certain process to not only establish a property right but to protect the same. If we do not stay in our separation-of-powers lane, we run the risk of creating, on the one extreme, a

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system that does not adequately protect petitioner's concerns, and at the other, creating unworkable standards and procedures which lead to even more litigation.

To the merits of this matter, the majority concludes that the trial court did not have jurisdiction to issue the requested order. For the reasons stated below, I dissent from the majority opinion.

## A prosecutor

is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

*Berger v. United States*, 295 U.S. 78, 88 (1935). "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice." N.C. Rules of Prof'l Conduct r. 3.8, cmt. 1 (2017).

North Carolina's District Attorneys are responsible for, *inter alia*, "the prosecution on behalf of the State of all criminal actions in" his or her prosecutorial district. N.C. CONST. art. IV, § 18(1); *see also* N.C. Gen. Stat. § 7A-61 (2019). "The district attorney's performance of his duties . . . is tempered by his obligation to the defendant to assure that he is afforded his right to a fair trial." *State v. Barfield*, 298 N.C. 306, 331, 259 S.E.2d 510, 531 (1979).

The United States Supreme Court has acknowledged that criminal defendants have "what might loosely be called . . . constitutionally guaranteed access to evidence." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). In *Brady v. Maryland*, the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "The *Brady* rule is based on the requirement of due process. Its purpose is . . . to ensure that a miscarriage of justice does not occur." *United States v. Bagley*, 473 U.S. 667, 675 (1985) (footnote omitted).

In *Giglio v. United States*, the United States Supreme Court expanded *Brady* to require disclosure of evidence that could be used to impeach the credibility of a State's witness "[w]hen the reliability of

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[the] witness may well be determinative of guilt or innocence.” *Giglio v. United States*, 405 U.S. 150, 154 (1972) (citation and quotation marks omitted). Further, “suppression of material evidence justifies a new trial irrespective of the good faith or bad faith of the prosecution.” *Id.* at 153 (citation and quotation marks omitted).

In addition, prosecutors in the State of North Carolina are required to “make timely disclosure to the defense of all evidence or information . . . that tends to negate the guilt of the accused or mitigates the offense” without regard to materiality. N.C. Rules of Prof’l Conduct r. 3.8(d), r. 3.8 cmt. 4 (2017).

Evidence that a witness has been untruthful may be useful to a defendant, not only in calling into question the credibility of that witness, but also to attack “the reliability of [an] investigation.” *Kyles v. Whitley*, 514 U.S. 419, 447 (1995). Thus, even without the issuance of the *Giglio* order by the trial court, pursuant to *Brady* and Rule 3.8(d) of the North Carolina Rules of Professional Conduct, the State would have a duty to disclose the criminal investigative file at issue here to any future defendant in any future case in which petitioner would testify.

In this case, the criminal investigative file in question contained evidence suggesting that petitioner “may have mislead (*sic*) and deceived a superior officer in the performance of his duties” and “may have not been truthful and honest in the preparation of the investigative report related to his actions that may have mislead (*sic*) and deceived a superior officer” such that the State had “a sufficient basis to believe that potential impeachment or exculpatory evidence” existed within the file. Disclosure of this evidence would be required for every criminal defendant in a case where petitioner was a potential witness. This is not speculative or anticipatory; it is basic criminal procedure. In fact, petitioner has not argued that the information contained in the criminal investigative file would not be subject to disclosure under *Brady* or *Giglio*, or the Rules of Professional Conduct.

The question of “[w]hether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal.” *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted). “[A]n order of a court is void where the court’s [subject matter] jurisdiction was never properly invoked.” *State v. Santifort*, 257 N.C. App. 211, 219, 809 S.E.2d 213, 219 (2017).

“Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute.” *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). Our General Assembly,

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“within constitutional limitations, can fix and circumscribe the jurisdiction of the courts of this State.” *Bullington v. Angel*, 220 N.C. 18, 20, 16 S.E.2d 411, 412 (1941). “Where jurisdiction is statutory and the Legislature requires the Court to exercise its jurisdiction in a certain manner, to follow a certain procedure, or otherwise subjects the Court to certain limitations, an act of the Court beyond these limits is in excess of its jurisdiction.” *Eudy v. Eudy*, 288 N.C. 71, 75, 215 S.E.2d 782, 785 (1975). Where jurisdiction is statutory and our legislature *has not* prescribed a certain manner, procedure, or limitation, the court is required to “utilize its inherent power and implement and follow procedures which effectively and practically . . . effectuate the intent of [the statute.]” *Santifort*, 257 N.C. App. at 221, 809 S.E.2d at 220-21; *see also State v. Hardy*, 293 N.C. 105, 124, 235 S.E.2d 828, 840 (1977) (explaining that the trial court is “not necessarily preclude[d] . . . from ordering discovery in his discretion.”).

“Disclosure of records of criminal investigations . . . that have been transmitted to a district attorney or other attorney authorized to prosecute a violation of law shall be governed by [Section 132-1.4] and Chapter 15A of the General Statutes.” N.C. Gen. Stat. § 132-1.4(g) (2019). “Records of criminal investigations conducted by public law enforcement agencies . . . may be released by order of a court of competent jurisdiction.” N.C. Gen. Stat. § 132-1.4(a).

Pursuant to Section 132-1.4(b)(1),

“Records of criminal investigations” means all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law, including information derived from witnesses, laboratory tests, surveillance, investigators, confidential informants, photographs, and measurements. The term also includes any records, worksheets, reports, or analyses prepared or conducted by the North Carolina State Crime Laboratory at the request of any public law enforcement agency in connection with a criminal investigation.

N.C. Gen. Stat. § 132-1.4(b)(1).

Section 132-1.4 does not provide a precise procedure for a trial court's authorization to release records of criminal investigations. Thus, the trial court must “utilize its inherent power and implement and follow procedures which effectively and practically effectuate the intent of [the statute]” if it is to order the release of records of criminal

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investigations. *In re Brooks*, 143 N.C. App. 601, 611, 548 S.E.2d 748, 755 (2001) (*purgandum*).

This Court has not specifically ruled on whether, and by what process, a trial court may properly review law enforcement investigation files *in camera* pursuant to an *ex parte* motion of a prosecutor to determine whether the content of the files requires disclosure under *Brady*, *Giglio*, or the Rules of Professional Conduct. However, our opinions in *In re Albemarle Mental Health Center*, 42 N.C. App. 292, 256 S.E.2d 818 (1979) and *In re Brooks* are instructive.<sup>1</sup>

In *Albemarle Mental Health* and *Brooks*, this Court determined whether the superior court had jurisdiction to issue *ex parte* orders for disclosure of certain records or information after *in camera* review where the General Statutes provided for judicial disclosure but did not “provide precise statutory directions for fulfilling this responsibility.” *Albemarle Mental Health*, 42 N.C. App. at 296, 256 S.E.2d at 821. In those cases, this Court considered (1) whether the superior court’s jurisdiction had been properly invoked under applicable statute, and (2) whether the process used to obtain the *ex parte* orders was in keeping with the intent of the statute.

In *Albemarle Mental Health*, a District Attorney learned that an employee at the Albemarle Mental Health Center had obtained information about an alleged murder from an unnamed patient. The District Attorney requested that the clinic’s director provide the information either to him or to an agent at the State Bureau of Investigation. *Id.* at 293, 256 S.E.2d at 819. The clinic’s director declined to provide the

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1. In *Santifort*, this Court deviated from its earlier holdings in *Albemarle Mental Health* and *Brooks* that a district attorney’s failure to follow the Rules of Civil Procedure to initiate a special proceeding need not preclude the superior court’s jurisdiction. *Santifort*, 257 N.C. App. at 222, 809 S.E.2d at 221. While the *Santifort* court noted that the State’s *ex parte* motions should have been treated as initiating a special proceeding, it nonetheless held that “the State never took the steps necessary to invoke the superior court’s jurisdiction” where a “special proceeding was not officially initiated nor docketed.” *Id.* at 216, 222, 809 S.E.2d at 218, 221.

We note that “our Supreme Court has instructed this Court, ‘where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.’” *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). [*Santifort*] created a direct conflict in this area of the law by deviating from precedent.” *In re I.W.P.*, 259 N.C. App. 254, 263, 815 S.E.2d 696, 704 (2018). “[W]here there is a conflicting line of cases, a panel of this Court should follow the older of those two lines.” *Id.* at 263, 815 S.E.2d at 704 (quoting *Respass v. Respass*, 232 N.C. App. 611, 625, 754 S.E.2d 691 701 (2014)). Accordingly, *Albemarle Mental Health* and *Brooks* should control.



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information citing physician/patient privilege under N.C. Gen. Stat. § 8-53, or psychologist/client privilege under N.C. Gen. Stat. § 8-53.3. *Id.* at 298, 256 S.E.2d at 822.

“The District Attorney, sensitive to his responsibility to enforce the criminal law in his district,” *Id.* at 300, 256 S.E.2d at 823, then filed a motion in the superior court, pursuant to N.C. Gen. Stat. § 8-53.3, requesting an *in camera* hearing “to determine: (1) whether [the requested] information . . . constituted privileged information; (2) whether such information was relevant to an alleged homicide . . . , and; (3) whether disclosure of such information to law enforcement officers was necessary to a proper administration of justice.” *Id.* at 293, 256 S.E.2d at 819. The District Attorney asked that the superior court “issue an order . . . compelling disclosure of the information *if the court determined* that the information was relevant to criminal acts and that its disclosure was necessary to provide for the proper administration of justice.” *Id.* at 293-94, 256 S.E.2d at 819-20 (emphasis added).

The superior court ordered the clinic director and employees to appear, but concluded that it did not have jurisdiction “to proceed and to determine the merits, rights and duties of the parties” because “[n]o criminal proceeding ha[d] been instituted,” and “[n]o subpoena or other lawful process of the Court had been issued in any judicial proceeding giving the Court jurisdiction over the . . . [c]enter.” *Id.* at 294-95, 256 S.E.2d at 818.

On appeal, the State argued that the “cause [was] in the nature of a special proceeding.” *Id.* at 295, 256 S.E.2d at 820.

G.S. 1-2 provides that “An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.” G.S. 1-3 provides that “Every other remedy is a special proceeding.” Moreover, G.S. 1-394 provides in part that “Special proceedings against *adverse parties* shall be commenced as is prescribed for civil actions.” . . . [P]ursuant to G.S. 1A-1, Rule 3 . . . a civil action may be commenced only by the filing of a complaint or by the issuance of a summons with permission of the court to file complaint within twenty days.

*Id.* at 295-96, 256 S.E.2d at 820-21 (emphasis added). The respondent argued that because the special proceeding was not commenced pursuant to the Rules of Civil Procedure, the superior court did not have jurisdiction. *Id.* at 295, 256 S.E.2d at 820.



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This Court noted that while the proceeding was “[c]learly . . . not commenced pursuant to our statutory requirements for initiating a civil action . . . our law is [not] so inflexible as to preclude the superior court’s jurisdiction in a matter of such moment.” *Id.* at 296, 256 S.E.2d at 821. This Court further stated that

[t]he superior court is the proper trial division for [a special] proceeding of this nature. *See* G.S. 7A-246. The judicial power of the superior court is that which is granted by the Constitution and laws of the State. *Baker v. Varser*, 239 N.C. 180, 79 S.E. 2d 757 (1954). Within the guidelines of our Constitution, the legislature is charged with the responsibility of providing the necessary procedures for the proper commencement of a matter before the courts. Occasionally, however, the proscribed (*sic*) procedures of a statutory scheme fail to embrace the unanticipated and extraordinary proceeding such as that disclosed by the record before us. In similar situations, it has been long held that courts have the inherent power to assume jurisdiction and issue necessary process in order to fulfill their assigned mission of administering justice efficiently and promptly.

*Id.* at 296, 256 S.E.2d at 821. Where “[o]ur legislature plainly intended that the implementation of [statutory] provisos . . . be a function of the judiciary[,]” but failed to “provide precise statutory directions for fulfilling this responsibility, it becomes incumbent upon the courts to proceed in a manner consistent with law.” *Id.* at 296, 256 S.E.2d at 821.

Under the above facts, this Court determined that the superior court in *Albemarle Mental Health* had “proceed[ed] in a manner consistent with” the statutory proviso that “the presiding judge of a superior court may compel [ ] disclosure, if in his opinion the same is necessary to a proper administration of justice.” *Id.* at 296-97, 256 S.E.2d at 821-22 (citation and quotation marks omitted).

In *Brooks*, the Orange County District Attorney filed *ex parte* petitions seeking the release of the personnel and internal affairs files of two police officers. The petitions included factual allegations related to an assault allegedly committed by the officers, as well as a statement by the District Attorney that the files were “necessary to a full and complete investigation . . . and [release of the files] would be in the best interest of the administration of justice.” *Brooks*, 143 N.C. App. at 602, 548 S.E.2d at 750. The petitions “were not supported by affidavits, [and did not] reference any legal authority allowing [the District Attorney] to seek

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the release.” *Id.* at 602, 548 S.E.2d at 750. The superior court granted the District Attorney’s requests and ordered the release of the personnel and internal affairs records. The officers appealed, arguing, *inter alia*, that the superior court had neither jurisdiction, nor the authority to order the disclosure of the records. *Id.* at 606, 548 S.E.2d at 752. The State argued that “the [s]uperior [c]ourt retained the authority to grant [the District Attorney’s] request pursuant to North Carolina General Statutes section 160A-168.” *Id.* at 606, 548 N.C. App. at 752. According to the officers, because the applicable statute “provide[d] no statutory basis to initiate such a release of documents on an *ex parte* basis,” it does not authorize the release of their personnel files. *Id.* at 606, 548 N.C. App. at 752 (quotation marks omitted).

This Court concluded that where a statute authorizes the disclosure of “personnel files by order of a court of competent jurisdiction,” but does not “specify the exact procedure required to obtain such an order, or whether such an order could be sought without first filing a civil or criminal action.” *Id.* at 608-09, 548 S.E.2d at 753.

[T]here is nothing inherent in the wording of [the statute] that would *prohibit* the court in the proper administration of justice from requiring disclosure . . . the [s]uperior [c]ourt [is] required to exercise its inherent or implied power for the proper administration of justice and fashion an order allowing for the disclosure of the records pursuant to [the statute].

*Id.* at 608-09, 548 S.E.2d at 753 (quotation marks omitted). Furthermore, this Court reasoned that the proceeding before the superior court was a special proceeding because “it was not an action in an ordinary proceeding in a court of justice.” *Id.* at 609, 548 S.E.2d at 754 (*purgandum*). “[T]he [s]uperior [c]ourt is the proper division . . . for the hearing and trial of all special proceedings.” *Id.* at 609, 548 S.E.2d at 754. (citation and quotation marks omitted). Therefore, the District Attorney’s failure to “comply with the Rules of Civil Procedure . . . was not fatal.” *Id.* at 609, 548 S.E.2d at 754.

This Court ultimately held that the superior court erred in ordering the release of the police officer’s personnel files. We found the superior court had failed to “implement and follow procedures which ‘effectively and practically . . . effectuate[d] the intent of [Section 160A-168],’ that an officer’s files remain confidential. . . .” where “[t]he petitions were unsworn, not accompanied by any affidavits or other similar evidence, and amounted to nothing more than [the District Attorney’s] own opinion—that the disclosure of the officers’ files was ‘in the best

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interest of the administration of justice.’ ” *Id.* at 611, 548 S.E.2d at 755 (citation omitted).

Similar to *Albemarle Mental Health* and *Brooks*, the prosecutor here filed the State’s *Ex Parte* Motion for *In Camera* Review of Investigative Report and for Protective Order (State’s *Ex Parte* Motion) in recognition of an underlying duty—in those cases, to investigate and prosecute an alleged crime, here, to disclose information pursuant to *Brady*, *Giglio*, and the Rules of Professional Conduct.

In this case, the criminal investigative file consists of investigation report forms, victim and witness statements, supplementary investigation reports, suspect interview notes, arrest warrants, arrest reports, release orders, DNA collection forms, fingerprint cards, suspect photos, and lineup related materials “that [were] compiled by [the Washington County Sheriff’s Office] for the purpose of” solving a home invasion and alleged assault with a deadly weapon. N.G. Gen Stat. § 132-1.4(b)(1). Under the plain language of Section 132-1.4, these records are law enforcement “[r]ecords of criminal investigations” subject to disclosure “by order of a court of competent jurisdiction.” N.C. Gen. Stat. § 132-1.4(a).

However, the legislature failed to specify the exact procedure required to obtain such an order, or whether such an order could be sought without first filing a civil or criminal action. As in the case of [*Albemarle*] *Mental Health* [], the legislature’s failure to provide for the proper procedure did not negate the Superior Court’s authority, granted by [Section 132-1.4], to order the disclosure of the [law enforcement investigation files]. For there is “nothing inherent in the wording of [Section 132-1.4] that would *prohibit* the court in the proper administration of justice from requiring disclosure prior to the initiation of criminal charges or the commencement of a civil action.” [*Albemarle*] *Mental Health Center*, 42 N.C. App. at 297, 256 S.E.2d at 822. As such, this is one of those “extraordinary proceedings” in which the Superior Court was required to exercise “its inherent or implied power for the proper administration of justice” and fashion an order allowing for the disclosure of the records pursuant to [Section 132-1.4]. *Id.* at 296, 256 S.E.2d at 821.

Like the proceeding[s] in [*Albemarle*] *Mental Health* [] [and *Brooks*.] the proceeding in the present case was a “special proceeding,” in that it was not “an action [] in an

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ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense.” N.C. Gen. Stat. § 1-2 (1999); *see also* N.C. Gen. Stat. § 1-3 (1999) (stating that actions not defined in section 1-2 are “special proceedings”). Unlike the statute discussed in [*Albemarle*] *Mental Health* [], the statute at issue in the present appeal does not specify which division of court is authorized to issue the order allowing disclosure. However, our General Statutes mandate that the Superior Court “is the proper division, without regard to amount in controversy, for the hearing and trial of all special proceedings.” N.C. Gen. Stat. § 7A-246 (1999). Although [the district attorney] did not comply with the Rules of Civil Procedure, *see* N.C. Gen. Stat. § 1-393 (1999) (stating that Rules of Civil Procedure apply to special proceedings), like the DA’s actions in [*Albemarle*] *Mental Health* [], such failure was not fatal to his [motion].

*Brooks*, 143 N.C. App. at 608-09, 548 S.E.2d at 753-54.

In both *Albemarle Mental Health* and *Brooks*, this Court held that the superior court had “jurisdiction to proceed and to determine the merits, rights and duties of the parties,” in a special proceeding that was “not commenced pursuant to our statutory requirements for initiating a civil action.” *Albemarle Mental Health*, 42 N.C. App. at 295-96, 256 S.E.2d at 820-21; *see also Brooks*, 143 N.C. App. at 609, 548 S.E.2d at 754 (“Although [the District Attorney] did not comply with the Rules of Civil Procedure, . . . such failure was not fatal to [his] petitions.”).

Here, Section 132-1.4 provides that a court of competent jurisdiction may order the release of certain records. N.C. Gen Stat. § 132-1.4. However, Section 132-1.4 does not grant any individual a property or privacy interest in the content of criminal investigative files, or procedural safeguards surrounding disclosure of the information contained therein.

In addition, the underlying purpose of seeking the superior court’s *ex parte* review and ultimate disclosure should be a relevant consideration. In *Brooks*, the evidence was necessary to allow the trial court to “make an independent determination as to whether the interests of justice require[d] disclosure of the confidential employment information.” *Brooks*, 143 N.C. App. at 612, 548 S.E.2d at 755. Such is the case here. The prosecutor was seeking an independent judicial determination as to whether or not the criminal investigative file contained *Brady/Giglio*

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information subject to disclosure. As noted above, all defendants have a constitutional right to exculpatory and impeachment evidence. Here, the disclosure of the evidence at issue is necessary to accomplish that constitutional requirement and to serve the ends of justice for all criminal cases in which petitioner may be called to testify.

However, unlike in *Brooks*, the prosecutor in this case neither encouraged nor discouraged disclosure of the criminal investigative file. Rather, as in *Albemarle Mental Health*, the prosecutor requested that the court conduct an independent review of the criminal investigative file to determine whether it should be disclosed under *Brady* and *Giglio*. Contrary to petitioner's argument, there was no additional or different information necessary to allow the trial court to make an independent judgment on disclosure of the criminal investigative file. The only question was whether the evidence contained in the file could implicate *Brady* or *Giglio* concerns.

The purpose of Section 132-1.4 is to limit access to criminal investigative files. There are relatively few protections or procedural guarantees available to any individual that provides or obtains information in a criminal investigation. The over-arching concern is protecting the constitutional rights of criminal defendants. The *ex parte* motion here sought to do just that: protect the rights of future criminal defendants by complying with legal and ethical requirements.

Here, the trial court proceeded within the intent of Section 132-1.4 to limit access to the file to appropriate parties and situations. The District Attorney's Office had a constitutional duty and ethical obligation to release the contents of this particular criminal investigative file. The trial court acted pursuant to statutory authority under Section 132-1.4 and followed a procedure consistent with the intent of that statute.

However, while the trial court had authority to order the release of the criminal investigative files subject to its *Giglio* order, this Court is without jurisdiction to reach the merits of petitioner's claims. "Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court." N.C. Gen. Stat. § 1A-1, Rule 3 (2019).

To appeal from a trial court to this Court, one must be an aggrieved party to the proceeding from which he or she wishes to appeal. N.C. Gen. Stat. § 1-271 (2019); *see also Duke Power Co. v. Salisbury Zoning Bd. of Adj.*, 20 N.C. App. 730, 731-32, 202 S.E.2d 607, 608 (1974). Petitioner was not a party to the special proceeding, which was initiated by the State's

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*ex parte* motion. In addition, as touched on above, petitioner has no recognized personal, privacy, or property interest in the contents of the criminal investigative file. While one certainly understands petitioner's preference that the file not be released pursuant to *Brady* and *Giglio*, the petitioner was not a party to the proceeding within the meaning of our Appellate Rules. Thus, we should "dismiss the appeal for want of jurisdiction." *Langley v. Gore*, 242 N.C. 302, 303, 87 S.E. 2d 519, 520 (1955).

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PAMELA LAUZIÈRE, EMPLOYEE, PLAINTIFF

v.

STANLEY MARTIN COMMUNITIES, LLC, EMPLOYER, AND AMERICAN ZURICH  
INSURANCE COMPANY, CARRIER, DEFENDANTS

No. COA18-982

Filed 5 May 2020

**Workers' Compensation—failure to prosecute—claim dismissed  
with prejudice—findings—evidentiary support**

The Industrial Commission erred by upholding the dismissal with prejudice of plaintiff's worker's compensation claim as a sanction for failure to prosecute (based on plaintiff's failure to fully and timely comply with discovery requests and to take any action to pursue her claim for at least a year) where the Commission's findings were unsupported by the evidence, including that defendants were materially prejudiced and bore substantial monetary expenses as a result of plaintiff's lack of action, and that lesser sanctions would have been inadequate based on the damage to defendants' ability to defend the claim and because defendants would be unlikely to recoup their costs from plaintiff.

Judge DILLON concurring in part and dissenting in part.

Appeal by Plaintiff from Opinion and Award entered 22 May 2018 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 10 April 2019.

*Lennon, Camak & Bertics, PLLC, by S. Neal Camak and Michael W. Bertics, for plaintiff-appellant.*

*Lewis & Roberts, P.L.L.C., by Mallory E. Lidaka and Bryan L. Cantley, for defendants-appellees.*

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MURPHY, Judge.

The North Carolina Industrial Commission’s (“the Commission”) conclusions of law must be justified by its findings of fact and its findings of fact must be supported by competent evidence. As a sanction, the Full Industrial Commission dismissed Pamela Lauziere’s (“Lauziere”) claim with prejudice for failure to prosecute after it found that the “monetary damages incurred by [Stanley Martin Communities (“Stanley Martin”) and Zurich American Insurance, (together, “Defendants”)] as a result of [Lauziere’s] conduct could not be recouped by Defendants even if ordered by the Commission.” This finding is unsupported by the evidence because no competent evidence suggests Lauziere is unable to pay monetary damages or the Defendants are unable to recoup their losses. Accordingly, we reverse and remand for further proceedings.

**BACKGROUND**

Lauziere was a realtor for Stanley Martin. On 20 September 2015, Lauziere allegedly sustained an injury while trying to manually shut a garage door at a model home. Stanley Martin denied Lauziere’s claim for the alleged injuries.

Lauziere filed her request for hearing with the Commission on 30 November 2015. On 7 January 2016, Defendants sent Lauziere pre-hearing interrogatories and a *Request for Production of Documents*. This first set of discovery requests asked for information including medical information or documentation detailing Lauziere’s medical history before and after the alleged injury. In February 2016, Lauziere responded to Defendants’ first set of discovery requests. In part, her counsel responded that certain medical records were unavailable and would be “supplemented” at a later time. Following an impasse at a Commission ordered mediation, Lauziere’s attorney was allowed to withdraw by order filed 10 March 2016. On 16 March 2016, Defendants served a second set of discovery requests on the now pro se Lauziere. The parties received notice the case was set for hearing on 3 May 2016.

On 22 April 2016, seven days after the 30-day deadline for Lauziere to file her discovery responses, Defendants moved for an order compelling Lauziere to respond to their second set of discovery requests. Three days later, Lauziere underwent major lower back surgery, and she notified Defendants of her condition. Lauziere did not file a response to Defendants’ Motion to Compel. On 28 April 2016, the deputy commissioner continued the case off of his 3 May 2016 hearing docket. On 16 June 2016, in an email to Defendant’s counsel, Lauziere responded to



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Defendants' second set of discovery and requested her case be set on an expedited hearing docket. Six days later, Lauziere emailed Defendants to confirm they received her 16 June 2016 correspondence, but Defendants responded alleging insufficiency.

Over a year passed.

On 13 June 2017, Defendants moved to dismiss with prejudice. Lauziere responded to that motion within 24 hours. On 6 September 2017, a hearing was held on the *Motion to Dismiss with Prejudice*, and Lauziere attended this hearing pro se. Five days later, the Commission filed an Opinion and Award dismissing Lauziere's case with prejudice in accordance with Industrial Commission Rule 616(b).

Lauziere obtained legal counsel and appealed to the Full Industrial Commission on 18 September 2017. On 22 May 2018, the Full Industrial Commission filed an Opinion and Award affirming the decision dismissing Lauziere's case with prejudice. Plaintiff timely appeals.

### ANALYSIS

"Appellate review of an award from the Industrial Commission is generally limited to two issues: (i) whether the findings of fact are supported by competent evidence, and (ii) whether the conclusions of law are justified by the findings of fact." *Chambers v. Transit Mgmt.*, 360 N.C. 609, 611, 636 S.E.2d 553, 555 (2006) (citation omitted). However, "the choice of sanctions is a matter reviewed for abuse of discretion only." *Matthews v. Charlotte-Mecklenburg Hosp. Auth.*, 132 N.C. App. 11, 16, 510 S.E.2d 388, 392 (1999). Factors we have considered include the exclusivity provision of the Workers' Compensation Act, "the appropriateness of alternative sanctions under Rule 37, the proportionality of dismissal to the actions meriting sanction, and whether other statutory powers, such as holding a person in contempt . . . , can effectuate the result desired by the imposition of sanctions." *Id.* at 17, 510 S.E.2d at 393. We held, "when viewed in light of policy concerns of the Workers' Compensation Act, dismissing [the plaintiff's] case was an abuse of discretion" "because it effectively terminate[d the plaintiff's] exclusive remedy when other less permanent sanctions, such as civil contempt, were available to [the] Deputy Commissioner." *Id.*

The sole issue on appeal is whether the Commission erred in dismissing Lauziere's claim with prejudice. The Commission has "inherent judicial authority to dismiss a claim with or without prejudice for failure to prosecute," and this reflects its "power to efficiently administer the Workers' Compensation Act." *Lee v. Roses*, 162 N.C. App. 129,



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131, 590 S.E.2d 404, 406 (2004). Under Rule 616(b) of the Industrial Commission Rules,

[u]pon notice and opportunity to be heard, any claim may be dismissed with or without prejudice by the Commission on its own motion or by motion of any party if the Commission finds that the party failed to prosecute or to comply with the rules in this Subchapter or any Order of the Commission.

11 N.C.A.C. 23A.0616(b) (2019).

Neither the Workers' Compensation Act nor the Commission's Rules provide much direction as to when a finding of failure to prosecute is proper or what types of sanctions are appropriate under the circumstances. *Lentz v. Phil's Toy Store*, 228 N.C. App. 416, 421, 747 S.E.2d 127, 131 (2013). As a result, we look to Civil Procedure Rule 41(b) for guidance. *Id.* Rule 41(b) "allows a defendant to move for dismissal of a case for failure of plaintiff to prosecute, and requires a determination that 'plaintiff or his attorney manifests an intent to thwart the progress of the action or engages in some delaying tactic.'" *Id.* (internal marks and alterations omitted) (quoting *Lee*, 162 N.C. App. at 132, 590 S.E.2d at 407). We have determined that, before the Commission can dismiss with prejudice a workers' compensation claim for failure to prosecute under Rule 616(b), the Commission "must address . . . three factors in its order." *Lee*, 162 N.C. App. at 132-33, 590 S.E.2d at 407.

First, "whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter." *Id.* at 133, 590 S.E.2d at 407 (quoting *Wilder v. Wilder*, 146 N.C. App. 574, 578, 553 S.E.2d 425, 428 (2001)). Second, "the amount of prejudice, if any, to the defendant caused by the plaintiff's failure to prosecute." *Id.* (internal alterations omitted). Third, "the reason, if one exists, that sanctions short of dismissal would not suffice." *Id.* at 133, 590 S.E.2d at 407. The Commission's "findings of fact on these factors are conclusive on appeal if there is competent evidence to support its findings." *Lentz*, 228 N.C. App. at 421, 747 S.E.2d at 131-32.

"Our courts," however, "have stated that dismissal with prejudice is the most severe sanction available to the court in a civil case, and thus, it should not be readily granted." *Lee*, 162 N.C. App. at 132, 590 S.E.2d at 407. "This principle applies equally to the dismissal of a workers' compensation claim at the Industrial Commission since prosecution pursuant to the Workers' Compensation Act is an injured worker's exclusive remedy." *Id.* "Accordingly, the Full Commission err[s] as a matter of law when it . . . affirm[s] the deputy commissioner's order dismissing

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plaintiff's claim with prejudice for failure to prosecute without . . . the necessary findings of fact and conclusions of law to support its order[.]" *Id.* at 133, 590 S.E.2d at 408, and is an abuse of the Commission's discretion. *See Matthews*, 132 N.C. App. at 17, 510 S.E.2d at 393.

Further, a finding of the Commission based on legally incompetent evidence is not conclusive. *Penland v. Bird Coal Co.*, 246 N.C. 26, 30, 97 S.E.2d 432, 436 (1957); *see Ballenger v. Burris Indus., Inc.*, 66 N.C. App. 556, 568, 311 S.E.2d 881, 888 (1984) (providing that we can declare when proffered evidence "does not constitute any sufficient competent evidence on which to base a denial of" a workers' compensation claim). Upon our review of the Record—a record devoid of an evidentiary hearing—the Commission erred on three grounds due to a lack of competent evidence.

To begin, Finding of Fact 24 is unsupported by evidence. The finding states,

[b]ased upon a preponderance of the evidence in view of the entire record, the Full Commission finds that Defendants have been *materially prejudiced* by [Lauziere]'s failure to respond to discovery or otherwise prosecute her claim for a year. [Lauziere] has thereby delayed adjudication of this matter and deprived Defendants of any meaningful opportunity to investigate or present defenses to [Lauziere]'s claim or to *direct care* if the claim is ultimately determined on the merits and found to be compensable.

(Emphasis added). No competent evidence in the Record supports that Defendants have been materially prejudiced. For instance, Defendants proffered nothing to show how the delay impaired their ability to locate witnesses, medical records, treating physicians, or any other data. As to the argument Defendants were prejudiced by being unable to direct medical care, we have "long held that the right to direct medical treatment is triggered only when the employer has accepted the claim as compensable." *Yingling v. Bank of Am.*, 225 N.C. App. 820, 838, 741 S.E.2d 395, 407 (2013) (internal marks omitted). This principle still applies when an employer denies a claim and then seeks dismissal with prejudice for failure to prosecute; an employer cannot with one breath deny a worker's compensation claim and with the next breath cry prejudice. *See id.* at 839, 741 S.E.2d at 407; *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000) ("But until the employer accepts the obligations of its duty, i.e., paying for medical treatment, it should not enjoy the benefits of its right, i.e., directing how that treatment is to be carried out."). Defendants denied Lauziere's claim and had

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no right to direct her medical care. Finding of Fact 24 is not supported by evidence.

Next, Finding of Fact 25 also lacks evidentiary support. The finding states,

[b]ased upon a preponderance of the evidence in view of the entire record, the Full Commission finds that *Defendants have borne substantial monetary expenses* as a result of [Lauzière]'s behavior in this matter. Among other things, Defendants have been forced to maintain an open file and prepare and travel for anticipated litigation, including mediation and scheduled hearings.

(Emphasis added). Defendants may have maintained an open file as well as prepared and traveled for anticipated litigation. But no evidence in the Record provides how much money Defendants expended, how often they traveled, or how far they traveled, let alone the unsupported conclusion Defendants bore “substantial” expenses. We do not assume mere motions, orders, correspondence, or hearing transcripts can show prejudice. These documents, standing alone, do not shed light on how much time or money was expended. Contrast this with *Lentz* where “[c]ompetent evidence in the record support[ed] the Commission’s finding that the file in plaintiff’s case [was] ‘replete with motions, correspondence, and hearing transcripts *documenting the time and effort defendants have expended* related to defending plaintiff’s claim and preparing for multiple hearings.’” *Lentz*, 228 N.C. App. at 424, 747 S.E.2d at 133 (emphasis added). The Record here, by contrast, is bereft of anything “documenting the time and effort” Defendants expended over defending Lauzière’s claim. *Id.* No evidence is referenced competent to provide an inference for the amounts of time, effort, or money Defendants expended. Thus, Finding of Fact 25 is also unsupported by evidence.

Finally, the Commission considered the sanctions prong of the *Lee* test and listed another finding<sup>1</sup> in Conclusion of Law 5:

A sanction short of dismissal with prejudice will not suffice in this case because no other sanction is appropriate

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1. “Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.” *Brown v. Charlotte-Mecklenburg Bd. of Ed.*, 269 N.C. 667, 670, 153 S.E.2d 335, 338 (1967). Although the Commission designated this statement a conclusion of law, it is a finding of fact. See *Martinez v. W. Carolina Univ.*, 49 N.C. App. 234, 239, 271 S.E.2d 91, 94 (1980) (“[T]he designations ‘Finding of Fact’ or ‘Conclusion of Law’ by the commission” are not conclusive).

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given that: (1) [Lauziere] delays and continues to delay this matter, (2) Defendants' ability to litigate and defend this claim has been irrevocably degraded by [Lauziere]'s actions and inactions, and (3) monetary damages incurred by Defendants as a result of [Lauziere]'s *conduct could not be recouped by Defendants* even if ordered by the Commission. Given the foregoing, sanctions short of dismissal could not provide appropriate or proportional relief to Defendants.

(Emphasis added). This suggests the Commission had evidence that Lauziere, if so ordered, could not pay a monetary sanction. Such evidence does not exist in the Record. At best, the Commission found that "Defendants have borne substantial monetary expenses as a result of [Lauziere's] behavior in this matter." This may be so, but neither this finding nor any evidence in the Record concerns Lauziere's ability to pay a monetary sanction or how costs to Defendants are otherwise unrecoverable. Thus, the finding that Defendants' "monetary damages . . . could not be recouped" is unsupported by the evidence in the Record.

Additionally, there is no finding of fact, nor any competent evidence, supporting the contention that "Defendants' ability to litigate and defend this claim has been irrevocably degraded." This claim has not yet been reached on the merits, and as outlined above there is no indication that Defendants cannot fully investigate and defend this claim with the same ferocity that they otherwise would have upon timely receiving the requested discovery. They seemingly will have the same access to evidence, witnesses, and medical records they otherwise would have had if discovery had been timely provided. The only irrevocably lost opportunity Defendants have suffered that is discussed by the Commission is the potential "to direct care if the claim is ultimately determined on the merits and found to be compensable." However, as discussed above, this is not a loss that could be properly considered by the Commission as an employer has no right to direct care until they accept the underlying claim as compensable. Even monetary losses in the form of legal expenses as a result of Plaintiff's delay seemingly could be recouped, as there is no evidence suggesting otherwise. As a result, there are no findings of fact to support the conclusion that the harm done to Defendants by Lauziere's delay was irrevocable.

Ultimately, this means the only finding the Commission used to support its conclusion that "[a] sanction short of dismissal with prejudice will not suffice" was "[Lauziere] delays and continues to delay this

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matter[.]” This finding alone does not support the conclusion that other sanctions would not have sufficed. The test in *Lee* requires the analysis of all three factors, the first of which is there was an unreasonable delay, and the third of which is sanctions short of dismissal with prejudice are inadequate. If the Commission could satisfy this third factor simply by stating that the Plaintiff has delayed the matter, essentially restating a part of the first factor of the *Lee* test, then the third factor would be rendered mere surplusage.

“[T]he Commission’s findings are conclusory and not supported by competent evidence.” See *Shaw v. United Parcel Serv.*, 116 N.C. App. 598, 602, 449 S.E.2d 50, 53 (1994), *aff’d*, 342 N.C. 189, 463 S.E.2d 78 (1995). No competent evidence in the Record implies that Defendants were prejudiced by the delay, were wrongfully deprived of a right to direct care, were burdened with substantial monetary expenses or were unable to recoup the same.

To prevent future inefficiency, delay, or harm to the parties, we address the utility of available sanctions under the Workers’ Compensation Act in these circumstances. Failure to comply with an order to compel is not the same as failure to prosecute, and evidence applicable to the former may be inapplicable to the latter. Without the necessary evidence or findings, other less permanent sanctions remained available, such as civil contempt. See N.C.G.S. § 97-80(g) (2019) (“The Commission or any member or deputy thereof shall have the same power as a judicial officer . . . to hold a person in civil contempt . . . for failure to comply with an order of the Commission, Commission member, or deputy”); see, e.g., *In re Hayes*, 200 N.C. 133, 141, 156 S.E. 791, 795 (1931) (discussing “the power to adjudge [a] witness in contempt and to punish for such contempt”). This is not to say that an order for civil contempt is needed before the Commission can dismiss with prejudice for failure to prosecute. However, “in light of the policy behind North Carolina’s Workers’ Compensation Act, to provide a swift and certain remedy to an injured worker[,] to ensure a limited and determinate liability for employers[,]” and to furnish Lauziere’s “exclusive remedy,” *id.* at 16-17, 510 S.E.2d at 393, the Commission, when applying the *Lee* test, must ensure its conclusions are justified by the findings of fact and those findings of fact are supported by competent evidence. See *Chambers*, 360 N.C. at 611-12, 636 S.E.2d at 555 (declaring that “[i]f the conclusions of the Commission are based upon a deficiency of evidence or misapprehension of the law, the case should be remanded so that the evidence may be considered in its true legal light”) (internal marks, alterations, and citations omitted).

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**CONCLUSION**

“[T]he Full Commission erred as a matter of law when it . . . affirmed the deputy commissioner’s order dismissing plaintiff’s claim with prejudice for failure to prosecute without . . . the necessary findings of fact and conclusions of law to support its order.” *Lee*, 162 N.C. App. at 133, 590 S.E.2d at 408. “The order of dismissal is reversed and this cause remanded to the Industrial Commission for proceedings consistent with this opinion.” *Id.* at 133-34, 590 S.E.2d at 408.

REVERSED AND REMANDED.

Judge DILLON concurs in part, dissents in part, with separate opinion.

Judge HAMPSON concurs.

DILLON, Judge, concurring in part and dissenting in part.

The Full Commission has entered an order dismissing Plaintiff’s workers’ compensation claim. The majority concludes that the Full Commission’s order must be *reversed* and remanded because several of the Commission’s findings are not supported by the evidence and that the remaining findings do not support an order of dismissal. I conclude, however, that the appropriate mandate is for the Full Commission’s order to be *vacated* and remanded for further proceedings.<sup>1</sup> I believe that it would not be an abuse of discretion for the Full Commission to have ordered the dismissal based on its findings that I conclude *are*

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1. The majority’s mandate is “reversed and remanded.” “Reverse” and “vacate” are often used interchangeably by appellate judges. There is, indeed, some gray areas as to when “reverse” is the appropriate mandate and when “vacate” may be more appropriate. To me, “vacate” generally suggests (absent any clearer instructions in the opinion) that an order is being eliminated but not being replaced with a contrary order, so that “vacate and remand” generally suggests that the trial court is to reconsider the matter, but still *could* reach the same result. “Reverse,” though, suggests that the trial court got it wrong, so that “reverse and remanded” suggests that the trial court either enter a new order as directed or reconsider the matter, but may not reach the same result. Admittedly, I may not have always been consistent in my usage of these terms.

In any event, in the present case, I conclude that the trial court’s order must be vacated, so that on remand the trial court *could* still reach the same result, dismissal, as I believe that there are other findings in the order to support dismissal. The majority, though, states that the trial court’s order to dismiss was incorrect “as a matter of law” because it failed to make “the necessary findings of fact and conclusions of law to support its order.”

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supported by the evidence. (The majority concludes that several of the Commission's findings are not supported by the evidence. I, however, agree with the majority only with respect to some of these findings.)

In any event, I do not believe it would be appropriate for our Court to simply affirm the Full Commission based on the supported findings because we cannot know how the Commission would have exercised its discretion absent the unsupported findings. Therefore, my vote is to vacate and remand, such that the sanction of dismissal may still be considered by the Commission on remand.

### 1. Background

The findings, supported by the evidence, tend to show as follows:

Plaintiff, a residential real estate broker, seeks workers' compensation benefits, alleging that in September 2015, she suffered injuries to her back, neck, bilateral knees, and hips while trying to manually close a garage door at a home.

Plaintiff, however, suffered injuries *prior to* the garage door incident on a number of occasions. For instance, in June 2015, just three months prior to the garage door incident, Plaintiff was injured in an automobile accident, for which she received medical treatment. Also, Plaintiff had previously sought workers' compensation benefits for back and knee injuries, unrelated to her present claim.

Defendants initially denied liability for Plaintiff's September 2015 injuries, pending their investigation of the matter. As part of their investigation, Defendants sought discovery from Plaintiff of her medical history to determine whether, and to what extent, Plaintiff was injured by the garage door incident. However, Plaintiff has repeatedly failed to fully comply with Defendants' discovery requests, even though she has been compelled to do so by the Commission.

In the meantime, Plaintiff has undergone medical treatment at her own direction, which included major back surgery. Further, Plaintiff took no action to prosecute this matter for over a year, while Defendants continued to seek discovery of Plaintiff's medical history. Accordingly, in June 2017, Defendants moved to dismiss Plaintiff's claim.

In September 2017, the Deputy Commission dismissed Plaintiff's claim. Plaintiff appealed to the Full Commission. In its 2018 Opinion and Award, the Full Commission, agreeing with the Deputy Commissioner, ordered the matter dismissed with prejudice.



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## II. Analysis

The majority recognizes that the Full Commission, *in the exercise of its discretion*, may dismiss a matter where the Plaintiff engages in delay tactics.

The majority also recognizes that the Commission must consider three factors before dismissing a matter, citing *Lee v. Roses*, 162 N.C. App. 129, 590 S.E.2d 404 (2004) and *Lentz v. Phil's Toy Store*, 228 N.C. App. 416, 747 S.E.2d 127 (2013).

First, the Full Commission must consider “whether the plaintiff acted in a manner which deliberately or unreasonably delayed the matter[.]” *Lee*, 162 N.C. App. at 133, 590 S.E.2d at 407. The majority is not contending that this prong was not satisfied. Indeed, the Commission did consider this factor, determining that Plaintiff had caused the “unreasonable delay[.]” and that she continued to engage in the “unreasonable delay” of adjudication of the matter. And this determination could certainly be inferred from the findings and the evidence. For instance, the Commission found that Plaintiff repeatedly failed to fully comply with the discovery requests, even after being ordered by the Commission to do so. As found by the Commission, Plaintiff admitted to being lax in responding to the discovery requests and that she did nothing for over a year to prosecute her claim, all the while seeking medical treatment at her own direction.

Second, under *Lee*, the Commission must consider “the amount of prejudice, if any, to the defendant [caused by the plaintiff’s failure to prosecute][.]” *Id.* at 133, 590 S.E.2d at 407. The order shows that the Commission considered this factor. The majority contends that certain findings in the order supporting the Commission’s findings as to this prong are not supported by the evidence. I disagree.

The Commission expressly found, in Finding 24, that Defendants were “materially prejudiced by Plaintiff’s failure to respond to discovery and otherwise prosecute her claim for a year” in that Plaintiff’s actions deprived Defendants of “any meaningful opportunity to investigate . . . or to direct [Plaintiff’s] care[.]” The majority, though, states that there is no evidence that Defendants were materially prejudiced, correctly noting that an employer’s ability to direct an employee’s medical care is triggered only after the employer has accepted liability.

However, this misses the point that the right of an employer who has initially denied liability to direct care *can still be subsequently triggered* once the employer accepts liability. See *Kanipe v. Lane Upholstery*, 141



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N.C. App. 620, 624, 540 S.E.2d 785, 788 (2000). Here, the Commission essentially found that Plaintiff's improper conduct caused Defendants to lose its opportunity to make an informed decision to trigger their right to direct care.

Certainly, an employer should not be required to accept liability right away before it has investigated an alleged accident. For example, the General Assembly has provided in N.C. Gen. Stat. § 97-27(a) that an employer has the right to require its employee to submit to an examination, the purpose of which, according to our Court, "is to enable the employer to ascertain whether the injury is work-related or not and thus whether the claim is indeed compensable." *Id.* at 624, 540 S.E.2d at 788. In the same way, an employer has the right to discoverable medical records to ascertain whether an injury, in fact, was the result of a workplace accident.

To this end, an employee is required to provide her employer with the discoverable information necessary for the employer to make an informed decision whether to accept liability and exercise its right to direct care. This obligation is similar to an employee's statutory obligation to provide timely notice of her accident, the purpose of which (as described by our Supreme Court) "allows the employer to provide immediate medical diagnosis and treatment with a view to minimiz[e] the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury." *See, e.g., Booker v. Duke Med. Ctr.*, 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979). Indeed, our Court has recognized in such situations that "[p]ossible prejudice occurs where the employer is not able to provide immediate medical diagnosis and treatment with a view to minimiz[e] the seriousness of the injury and where the employer is unable to *sufficiently investigate* the incident causing the injury." *Lahey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 173, 573 S.E.2d 703, 706 (2002) (emphasis added).

Here, given Plaintiff suffered prior injuries and given the benign nature of the accident (closing a garage door) as the cause of Plaintiff's extensive injuries, it was certainly reasonable for Plaintiff's employer to require access to her discoverable medical records before accepting liability for her claimed new injuries. Plaintiff, though, thwarted Defendants' ability to investigate by withholding her medical records for years, all the while directing her own care. If those records demonstrate that Plaintiff did not suffer any further injury due to the garage door incident, then the dismissal by the Commission is of no harm to Plaintiff, as she would lose anyway. However, if the records are, indeed, favorable to Plaintiff's case, then Defendants have lost the opportunity to accept

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liability based on a knowledge of those records, and to direct Plaintiff's care these past several years.

Further, I disagree with the majority that Finding 25, supporting the second *Lee* factor is not supported by the evidence. Specifically, the Commission found that Defendants had "borne substantial monetary expense" pursuing Plaintiff's medical records. Admittedly, as the majority points out, there is no evidence in the record as to *the precise amount* of money or time Defendants actually spent chasing discovery for two years. However, the Commission made no finding as to the precise money or time spent. What the Commission did find – that Defendants spent some unknown amount of resources that was "substantial" – can be inferred from the evidence. For instance, there is evidence that Defendants' attorneys had to prepare a second set of discovery requests when Plaintiff's responses to the first set were incomplete; Defendants' attorneys had to seek (successfully after a hearing on the matter) an order compelling Plaintiff to fully comply with the discovery request; and after Plaintiff continued directing her own medical treatment without prosecuting her claim for over a year and without complying with the Commission's order to compel, Defendant's attorneys sought a dismissal, first before the Deputy Commissioner, and then, after preparing a brief for attending a hearing, before the Full Commission.

Finding 25 is similar to a finding made in *Lentz* sustained by our Court in affirming the Commission's order dismissing the claim of the plaintiff in that case. In *Lentz*, the Commission found that "Plaintiff's failure to prosecute this claim has resulted in prejudice to defendants, who have expended considerable time and resources attempting to defend the claim. [Defendants] have repeatedly prepared for hearing and appeared at hearings with witnesses, and plaintiff has failed to appear, even when ordered to appear." 228 N.C. App. at 423, 747 S.E.2d at 132.

I have reviewed the *Lentz* record on appeal, and I found nothing in that record showing the *exact amount* of time or money the defendants spent. The Commission's finding that the defendants expended "considerable" time and resources, though, was sustained by our Court: "On this record, we determine that the Commission's findings of fact were supported by competent evidence and its conclusions of law were supported by its findings of fact." *Id.* at 423, 747 S.E.2d at 132.

I see no difference between "considerable," as used by the Commission in *Lentz*, and "substantial," as used by the Commission here. Accordingly, I disagree with the majority and conclude that the record supports Finding 25.

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Under the third *Lee* prong, the Full Commission must consider “the reason, if one exists, that sanctions short of dismissal would not suffice.” *Lee*, 162 N.C. App. at 133, 590 S.E.2d at 407. Here, the Full Commission expressly considered this factor. It determined that lesser sanctions would not suffice, citing three separate reasons: (1) Plaintiff delayed in prosecuting her claim for over a year; (2) Defendants’ ability to litigate and defend the claim was “irrevocably degraded” by Plaintiff’s delay and by her failure to fully comply with discovery; and (3) Defendants had incurred litigation expenses due to Plaintiff’s conduct Defendants could never recoup from Plaintiff were Plaintiff ordered to pay Defendants for these expenses.

I disagree with the majority’s conclusion that there is no evidence that Defendants’ ability to litigate and defend has been “irrevocably degraded,” as it can be inferred from the record that Plaintiff has undergone extensive treatment without Defendants’ direction and that Plaintiff has delayed the matter *for the purpose of* completing her treatment before having to reengage with Defendants in this matter.

I agree, however, with the majority that there is no evidence regarding Plaintiff’s inability to pay Defendants’ expenses if ordered to do so. However, in my view, it would not be an abuse of discretion on remand for the Commission to otherwise determine that lesser sanctions would still be inappropriate based on the Commission’s other findings.

### III. Conclusion

I may not have made all of the findings regarding Plaintiff’s conduct, as made by the Commission or have exercised discretion in the same way. But, here, the Commission is the factfinder and is empowered with discretion to order a dismissal. Such order should be affirmed where it cannot be said that the Commission abused its discretion when its decision is supported by the findings and evidence.

But, here, not all of the Commission’s findings are supported by the evidence. I do conclude, however, that the remaining findings are sufficient to support a dismissal in the exercise of discretion. However, I cannot conclude that the Commission would reach the same result based on the remaining findings. Therefore, my vote is to vacate the dismissal order and remand the matter for further proceedings and that, on remand, the Commission, in its discretion, may order dismissal or order lesser sanctions.

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[271 N.C. App. 234 (2020)]

NORTH CAROLINA FARM BUREAU MUTUAL  
INSURANCE COMPANY, INC., PLAINTIFF

v.

JUDY LUNSFORD, DEFENDANT

No. COA19-458

Filed 5 May 2020

**Motor Vehicles—insurance—underinsured motorist coverage—  
policies applicable—stacking—equal coverage limits**

The trial court's ruling that defendant was not entitled to underinsured motorist coverage under her policy issued by plaintiff was affirmed where defendant was seriously injured in an out-of-state accident while a passenger in a vehicle driven by her sister and the underinsured coverage limits of defendant's policy was equal to the personal injury coverage limits under her sister's policy. Because the sisters resided in separate states in separate households (and because North Carolina law applied to the construction and application of an insurance contract between a North Carolina insurer and a North Carolina insured), pursuant to N.C.G.S. § 20-279.21(b)(4) the policies were not both "policies applicable" allowing stacking of coverages and the sum of the limits of liability for bodily injury under the sister's policy was not less than the applicable limits of defendant's underinsured motorist coverage as required under that section. Therefore, the sister's car was not an underinsured vehicle.

Judge STROUD concurring in the result.

Judge MURPHY dissenting.

Appeal by Defendant from Order and Declaratory Judgment entered 3 February 2019 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 13 November 2019.

*William F. Lipscomb for the Plaintiff-Appellee.*

*Burton Law Firm, PLLC, by Jason M. Burton, for the Defendant-Appellant.*

BROOK, Judge.

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Judy Lunsford (“Defendant”) appeals from the trial court’s grant of a motion for judgment on the pleadings in favor of North Carolina Farm Bureau Mutual Insurance Company, Inc. (“Plaintiff”) and issuance of a declaratory judgment that Defendant is not entitled to underinsured motorist coverage under her policy issued by Plaintiff. We affirm the Order and Declaratory Judgment of the trial court.

**I. Factual and Procedural Background**

On 22 May 2017, Defendant was a passenger in her sister’s 2015 Chevrolet Silverado when the two were involved in a tragic accident. Defendant’s sister lost control of the vehicle, ran over the median, and collided head-on with an oncoming 18-wheeler traveling in the opposite lane of traffic. Defendant’s sister lost her life in the accident and Defendant suffered serious injuries. The accident occurred in DeKalb County, Alabama. At the time of the accident, Defendant was a resident of North Carolina and her sister was a resident of Tennessee.

At the time of the accident, both Defendant and her sister carried automotive insurance. Defendant’s policy was issued by Plaintiff in North Carolina and her sister’s policy was issued by Nationwide in Tennessee, where each resided in May 2017. The coverage amounts in the policies are similar. Both policies limit the respective insurer’s liability for personal injuries to \$100,000 per occurrence and for injuries to under- or un-insured motorists to \$100,000 per occurrence.

Plaintiff initiated an action for a declaratory judgment on 24 October 2018 in Guilford County Superior Court requesting a determination that the underinsured motorist coverage in the policy it issued Defendant did not apply to the accident because her underinsured motorist coverage limits equaled her sister’s personal injury coverage, meaning Defendant was not underinsured at the time of the accident. After Defendant answered, Plaintiff moved the trial court for judgment on the pleadings on 19 December 2018 under Rule 12(c) of the North Carolina Rules of Civil Procedure. Following a 28 January 2019 hearing on the matter, the trial court granted Plaintiff’s motion and entered an Order and Declaratory Judgment in favor of Plaintiff on 13 February 2019. Plaintiff entered timely notice of appeal on 14 March 2019.

**II. Analysis**

The dispositive issue in this appeal is whether the vehicle in which Defendant was traveling with her sister at the time of the May 2017 accident qualified as an “underinsured motor vehicle” as that term is defined

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under North Carolina law. Because it did not, we affirm the Order and Declaratory Judgment of the trial court.

## A. Standard of Review

Under Rule 12(c) of the North Carolina Rules of Civil Procedure, “any party may move for judgment on the pleadings.” N.C. Gen. Stat. § 1A-1, Rule 12(c) (2019). “A motion for judgment on the pleadings should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.” *Carpenter v. Carpenter*, 189 N.C. App. 755, 761, 659 S.E.2d 762, 767 (2008). However, the motion should be granted when “the moving party has shown that no material issue of fact exists . . . and that he is clearly entitled to judgment.” *Affordable Care v. N.C. State Bd. of Dental Exam’rs*, 153 N.C. App. 527, 532, 571 S.E.2d 52, 57 (2002). “This Court reviews a trial court’s grant of a motion for judgment on the pleadings *de novo*.” *Carpenter*, 189 N.C. App. at 757, 659 S.E.2d at 764.

## B. Underinsured Motorist Coverage Under North Carolina Law

North Carolina law defines “underinsured motor vehicle” as

a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is *less* than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner’s policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (2019) (emphasis added). The statutory definition thus requires that the “sum of the limits of liability under all bodily injury liability . . . insurance policies applicable” be *less* “than the applicable limits of underinsured motorist coverage” for a vehicle involved in an accident to be considered underinsured. *Id.*

Whether an underinsured motorist policy is applicable at the time of an accident under N.C. Gen. Stat. § 20-279.21(b)(4) depends upon whether the claimant qualifies as a “person insured” as that term is defined by subdivision (3) of subsection (b) of the statute, which provides:

“persons insured” means the named insured and, while resident of the same household, the spouse of any named insured and relatives of either, while in a motor vehicle or otherwise, and any person who uses with the consent,

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expressed or implied, of the named insured, the motor vehicle to which the policy applies and a guest in the motor vehicle to which the policy applies or the personal representative of any of the above or any other person or persons in lawful possession of the motor vehicle.

*Id.* § 20-279.21(b)(3). The Supreme Court has explained:

[t]his section of the statute essentially establishes two “classes” of “persons insured”: (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

*Sproles v. Greene*, 329 N.C. 603, 608, 407 S.E.2d 497, 500 (1991) (citation omitted).

The reason the applicability of an underinsured motorist policy depends on whether the claimant qualifies as a “person insured” is that “[i]n North Carolina, insurance coverage for damages caused by uninsured and underinsured motorists ‘follows the person, not the vehicle[.]’ ” *Beddard v. McDaniel*, 183 N.C. App. 476, 645 S.E.2d 153, 153-54 (2007) (quoting *Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C. App. 193, 204, 444 S.E.2d 664, 671 (1994)). The Supreme Court put it slightly differently in *Sproles*, observing that “[c]lass one insureds have UIM coverage even if they are not in a ‘covered vehicle’ when injured.” 329 N.C. at 608, 407 S.E.2d at 500. The Supreme Court also noted in *Sproles* that “[a]ll other persons are class two insureds and are only covered while using [or guests in] ‘the motor vehicle to which the policy applies.’ ” *Id.* Our Court has therefore described underinsured motorist insurance as “essentially person oriented, unlike liability insurance[.] which is vehicle oriented.” *Honeycutt v. Walker*, 119 N.C. App. 220, 222, 458 S.E.2d 23, 25 (1995).

## C. Application

In the present case, the parties do not dispute whether Defendant is a named insured under the policy issued to her by Plaintiff; instead, they dispute, amongst other things, whether Tennessee or North Carolina law supplies the legal standards applicable to determining whether Ms. Chapman was underinsured at the time of the accident. While Defendant’s policy issued by Plaintiff is an insurance contract entered into by a North Carolina insurer and a North Carolina insured, and



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concerning the interests of a North Carolina citizen, and North Carolina law therefore applies to its construction and application, the policy does not cover her injuries from the May 2017 accident.<sup>1</sup> The limits of the policy issued by Plaintiff are \$50,000 per person and \$100,000 per accident, which are the same as the limits of the personal injury coverage under her sister's policy with Nationwide. Because these are the only two policies at issue, and the limits of Defendant's underinsured motorist coverage and her sister's personal injury coverage are equal, in this case "the sum of the limits of liability under [the] bodily injury liability . . . policies applicable" is *not* less "than the applicable limits of underinsured motorist coverage[.]" N.C. Gen. Stat. § 20-279.21(b)(4) (2019). Defendant's sister's vehicle therefore was not underinsured as that term is defined by North Carolina law.

In arguing otherwise, Defendant contends—and the dissent accepts—that Defendant is entitled to "stack the \$50,000.00 limit of UIM coverage in [Ms.] Chapman's Nationwide policy with the \$50,000.00 limit of UIM coverage in [Defendant's] NCFB policy." *See infra* at 245 (Murphy, J., dissenting). But this argument smuggles its conclusion from its first premise. This conclusion would follow if Defendant and her sister were members of the same household because then, Defendant and her sister would both be class one insureds as that term was defined by our Supreme Court in *Sproles*. *See* 329 N.C. at 608, 407 S.E.2d at 500. If Defendant and her sister were members of the same household, both the underinsured motorist coverage of \$50,000 per person and \$100,000 per accident in Defendant's policy and the "uninsured" motorist coverage of \$50,000 per person and \$100,000 per accident in Defendant's sister's policy would qualify as "policies applicable" under N.C. Gen. Stat. § 20-279.21(b)(4); the sum of their limits would be more than the personal injury liability limits of \$50,000 per person and \$100,000 per accident in Defendant's sister's policy; and, therefore, the 2017 accident would be covered by Defendant's underinsured motorist policy because her sister's vehicle would have been an "underinsured motor vehicle" at the time of the accident as North Carolina law defines that term. *See* N.C. Gen. Stat. § 20-279.21(b)(4) (2019). However, at the time of the accident,

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1. The same would be true if the definition of underinsured vehicle under Tennessee law applied. Tennessee law terms underinsured motor vehicles "uninsured motor vehicles"; *see* Tenn. Code § 56-7-1202(a)(1) (2017); however, in essence the definition under Tennessee law mirrors that of North Carolina, providing that " 'uninsured motor vehicle' means a motor vehicle . . . for which the sum of the limits of liability available to the insured under all . . . insurance policies . . . applicable . . . is *less* than the applicable limits of uninsured motorist coverage provided to the insured under the policy against which the claim is made[.]" *Id.* (emphasis added).



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Defendant was a resident of North Carolina and Defendant's sister was a resident of Tennessee. The underinsured motorist coverage in each of their policies were not *both* "policies applicable" to the accident, and the vehicle was not underinsured under North Carolina law. *See id.*

**III. Conclusion**

We affirm the order of the trial court because Defendant is not entitled to underinsured motorist coverage under her policy issued by Plaintiff.

AFFIRMED.

Judge STROUD concurs in result.

Judge MURPHY dissents by separate opinion.

MURPHY, Judge, dissenting.

Judy Lunsford ("Lunsford"), a North Carolina citizen, was severely injured in a car accident while riding in the car with her sister, Levonda Chapman ("Chapman"), in Alabama. Chapman's insurance policy contemplated coverage for a Tennessee resident and her Tennessee-registered vehicle. Nevertheless, Chapman's policy plainly states that it must be adjusted to comport with the Financial Responsibility Acts ("FRA") of other states if need be. Lunsford's personal auto insurance policy with the Plaintiff, North Carolina Farm Bureau Mutual Insurance Company, Inc. ("NCFB"), provides for \$50,000.00 of underinsured/uninsured motorist ("UIM") coverage. NCFB brought this suit seeking declaratory judgment that it does not need to pay out the UIM coverage limit here because Chapman's vehicle does not fit the definition of an "underinsured motor vehicle" under Tennessee law. However, because Chapman's vehicle is an underinsured motor vehicle under our FRA and Chapman's policy must comport with our FRA, I would hold Chapman's vehicle is an underinsured motor vehicle, and Lunsford is entitled to the \$50,000.00 of UIM coverage under her NCFB auto insurance policy.

**BACKGROUND**

This is a dispute over whether the Defendant-Appellant, Lunsford, is entitled to \$50,000.00 of underinsured motorist coverage from her auto insurer, Plaintiff-Appellee NCFB. Lunsford was involved in a car accident while riding with her sister, Chapman, in Alabama. Chapman lost

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control of her car, crossed the median of an interstate highway, and collided with a tractor-trailer. Chapman was killed and Lunsford sustained serious injuries.

At the time of the accident, Chapman was driving her car, which was covered by a Nationwide Insurance policy issued to her in her home state of Tennessee, with Lunsford as the sole passenger. Both Chapman's Nationwide policy and Lunsford's own auto insurance policy, issued by NCFB, provided coverage limits of \$50,000.00 per-person and \$100,000.00 per-accident. Nationwide has offered "the \$50,000[.00] policy limit of its [bodily injury] liability coverage to Lunsford."

NCFB filed a *Complaint for Declaratory Judgment* in the Guilford County Superior Court seeking judicial decree "that the UIM coverage of [Lunsford's policy] does not apply to [her] injuries from the . . . motor vehicle collision in question and that [Lunsford] is not entitled to recover any UIM coverage from said policy regarding the . . . motor vehicle collision in question[.]" In answering NCFB's complaint, Lunsford argued that she is entitled to UIM coverage for three reasons: (1) she denied the applicability of Tennessee law in the interpretation of the Nationwide policy "as it relates to [NCFB's] North Carolina UIM policy" and, instead, argued "North Carolina law, and only North Carolina law, controls the interpretation of, and relationship between, a North Carolina UIM policy and any other insurance policy at issue"; (2) Lunsford argued NCFB's claim is either barred by or inconsistent with the North Carolina FRA (N.C.G.S. § 20-279.21, et. seq.); and (3) Lunsford argued NCFB's claim is barred by existing North Carolina law and Lunsford's policy with NCFB.

The parties each moved for a judgment on the pleadings pursuant to N.C.G.S. § 1A-1, Rule 12(c), and, after a hearing on the motions, the trial court entered an order granting NCFB's motion for judgment on the pleadings, granting declaratory judgment in favor of NCFB, and denying Lunsford's motion for judgment on the pleadings. The trial court concluded the UIM policy "issued by [NCFB] to [Lunsford] does not apply to [Lunsford's] injuries from the [22 May 2017] motor vehicle collision in question and defendant is not entitled to recover any UIM coverage from [her NCFB] policy . . . ." Lunsford timely appeals.

### **ANALYSIS**

#### **A. Standard of Review**

Lunsford notes in her brief that "[t]his appeal concerns entirely a matter of law, not fact, and therefore the appropriate standard of review . . . is de novo." As is true in the analogous situation where we receive

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an appeal from a grant of summary judgment, “[b]ecause the parties do not dispute any material facts, ‘we review the trial court’s order . . . de novo to determine whether either party is entitled to [declaratory judgment on the pleadings].’ ” *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 149, 731 S.E.2d 800, 806 (2012) (quoting *Robins v. Town of Hillsborough*, 361 N.C. 193, 196, 639 S.E.2d 421, 423 (2007)) (internal alterations omitted). “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted).

**B. Declaratory Judgment**

The only distinct issue on appeal is whether the trial court erred in granting NCFB’s motion for judgment on the pleadings and, in turn, rendering a declaratory judgment that Lunsford is not entitled to the UIM coverage under her NCFB insurance policy. The parties’ major point of disagreement on appeal, as below, is whether we should apply the North Carolina definition or the Tennessee definition of “underinsured motorist” in interpreting the meaning of that term as it relates to Lunsford’s policy with NCFB. Lunsford is not entitled to receive UIM coverage unless Chapman’s vehicle is an “underinsured motor vehicle.”

In her brief, Lunsford argues Chapman’s Nationwide policy is governed by “North Carolina law, and only North Carolina law,” and should be interpreted as such. Lunsford further argues Chapman’s car is underinsured pursuant to our statutes and caselaw and she is, therefore, entitled to the (to-date) unpaid \$50,000.00 of UIM coverage contemplated in her policy with NCFB. NCFB concedes that Lunsford’s argument would be correct if North Carolina law applies to Chapman’s policy with Nationwide but argues Tennessee law—not ours—governs the applicable definition of “underinsured motor vehicle.”

Our General Statutes provide, “All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State . . . are subject to the laws thereof.” N.C.G.S. § 58-3-1 (2019). Lunsford’s insurance policy with NCFB falls under this statute as an insurance contract entered into by a North Carolina insurer and North Carolina insured, and concerning the interests of a North Carolina citizen. The parties spent much of their briefs, as well as their oral arguments, arguing about the applicability of N.C.G.S. § 58-3-1—and the related caselaw regarding the nexus between the interests insured under the policy and North Carolina law—on Chapman’s policy. *See*,

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*e.g., Collins v. Aikman Corp. v. Hartford Accident & Indemnity Co.*, 335 N.C. 91, 95, 436 S.E.2d 243, 246 (1993). However, this statute and the related cases do not factor in to today's decision, which is based instead on the conformity clause in Chapman's policy, our caselaw on such clauses, and our FRA. The caselaw regarding the nexus between the interests insured under Chapman's policy and our laws do not play a role in this decision.

Chapman's policy explicitly incorporates our FRA, and I would hold North Carolina's UIM definition in the FRA applies and Lunsford is entitled to \$50,000.00 of UIM coverage pursuant to her agreement with NCFB. This holding would apply regardless of any "nexus" between Chapman's policy and North Carolina.

In relevant part, our FRA defines "underinsured motor vehicle" as:

*a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of underinsured motorist coverage for the vehicle involved in the accident and insured under the owner's policy.*

N.C.G.S. § 20-279.21(b)(4) (2019) (emphasis added). Lunsford's NCFB auto insurance policy incorporates our FRA, and defines "underinsured motor vehicle" as:

[A] land motor vehicle or trailer of any type:

1. The ownership, maintenance or use of which is insured or bonded for liability at the time of accident; and
2. *The sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is equal to or greater than the minimum limit specified by the financial responsibility law of North Carolina and:*
  - a. is less than the limit of liability for this coverage; or
  - b. the total limit of liability available has been reduced to less than the limit of liability for this coverage by payment of damages to other persons.

Like Lunsford's policy, Chapman's Nationwide policy incorporates our FRA's definitions in certain circumstances, stating, "We will adjust

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this policy to comply . . . [w]ith the financial responsibility law of any state or province which requires higher liability limits than those provided by this policy.” We have held that where an out-of-state policy includes a conformity clause, “which, by its very terms, requires us to examine North Carolina law to determine” whether a certain kind of coverage is available, we will apply our laws in interpreting the out-of-state policy. *Cartner v. Nationwide Mut. Fire Ins. Co.*, 123 N.C. App. 251, 254, 472 S.E.2d 389, 391 (1996).

There was a provision nearly identical to the conformity clause in Chapman’s policy in an out-of-state insurance policy at issue in *Cartner*, 123 N.C. App. at 252, 472 S.E.2d at 390. In *Cartner*, we reasoned that although the Florida insurance policy included a “family member exclusion,” that exclusion did not comport with the “‘kind[s] of coverage’ required by North Carolina’s [FRA].” *Id.* at 255, 472 S.E.2d at 291. We required the defendant to “adjust the limits of its Florida policy to provide such coverage to plaintiff’s decedent as required by North Carolina [law].” *Id.* In following our precedent from *Cartner* here, Chapman’s Nationwide policy must be adjusted to comport with our FRA’s definition of an underinsured motor vehicle and the accompanying caselaw.

Tennessee law relies upon a different definition of “uninsured motor vehicles.”<sup>1</sup> Tennessee does not consider a vehicle “uninsured” where that vehicle is “[i]nsured under the liability coverage of the same policy of which the uninsured motor vehicle coverage is a part[.]” Tenn. Code Ann. § 56-7-1202(2)(A) (West 2017). There is similar language in Chapman’s insurance policy, which states that because she is entering into this insurance agreement to cover her car, that car can no longer be defined as an “uninsured motor vehicle.” Applying only this part of Chapman’s insurance policy and Tennessee’s law, Lunsford would not receive UIM coverage under her policy with NCFB because her accident did not involve an underinsured highway vehicle.

However, our FRA’s definition of “underinsured motor vehicle” is completely different from the one set out in Chapman’s policy and Tennessee’s statutes, and—as in *Cartner*—provides a different kind of coverage than what is contemplated in Chapman’s policy. *See Cartner*, 123 N.C. App. at 255, 472 S.E.2d at 291. Unlike Chapman’s policy, our FRA provides for UIM coverage in instances where, as here, the tortfeasor’s vehicle was covered by a policy that had lower bodily injury liability

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1. Tennessee does not differentiate between uninsured and underinsured motorists, both of which fall under the definition of “uninsured motorist.” Tenn. Code Ann. § 56-7-1202 (West 2017).

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limits than the applicable UIM limits in the victim's policy. N.C.G.S. § 20-279.21(b)(4) (2019). Pursuant to its conformity clause, Chapman's policy must be adjusted in order to comply with our definition of "underinsured motor vehicle," which requires more coverage than Chapman's policy would allow if applying Tennessee law.

For a UIM policy to be applicable under N.C.G.S. § 20-279.21(b)(4) the claimant must be a "person insured" under N.C.G.S. § 20-279.21(b)(3). Our Supreme Court has clarified that there are two classes of insureds:

[N.C.G.S. § 20-279.21(b)(3)] essentially establishes two "classes" of "persons insured": (1) the named insured and, while resident of the same household, the spouse of the named insured and relatives of either and (2) any person who uses with the consent, express or implied, of the named insured, the insured vehicle, and a guest in such vehicle.

*Sproles v. Greene*, 329 N.C. 603, 608, 407 S.E.2d 497, 500 (1991). "Class one insureds have UIM coverage even if they are not in a covered vehicle when injured. All other persons are class two insureds and are only covered while using the motor vehicle to which the policy applies." *Id.* (internal marks omitted). In this case, Lunsford, as the named insured, is a class one insured with respect to the NCFB policy, meaning that she has UIM coverage under this policy "even if [she is] not in a covered vehicle when injured." *Id.* (internal marks omitted). She is also a class two insured with respect to Chapman's Nationwide policy as a guest in the insured vehicle with consent of the named insured, meaning she also has UIM coverage under this policy because she was "using the motor vehicle to which the policy applies." *Id.* (internal marks omitted). In sum, Lunsford is able to receive UIM coverage under her own NCFB policy because, as a class one insured, it follows her even though she was injured in Chapman's car. Additionally, she is able to receive UIM coverage under Chapman's Nationwide policy because, as a class two insured, she was injured as a guest in a vehicle insured by Chapman's Nationwide policy.

In addition to the statutory definition of "underinsured motor vehicle," our caselaw provides that UIM limits in a tortfeasor's policy and the policy covering the injured passenger can be "stacked" to establish that the tortfeasor's car is an "underinsured highway vehicle." *Benton v. Hanford*, 195 N.C. App. 88, 94, 671 S.E.2d 31, 34 (2009). In *Benton*, much like the case *sub judice*, a guest in a car, Benton, was injured when the owner and operator of the car, Hanford, crashed the vehicle. *Id.* at

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89, 671 S.E.2d at 32. There, we stacked the UIM coverage of \$50,000.00 from the policy of the tortfeasor with the UIM coverage of \$100,000.00 from the policy of the injured guest in the car to determine that the tortfeasor's car, which only carried \$50,000.00 in liability coverage, was an underinsured motor vehicle under N.C.G.S. § 20-279.21(b)(4). *Id.* at 94, 671 S.E.2d at 35. Here, we should do the same; I would stack the \$50,000.00 limit of UIM coverage in Chapman's Nationwide policy with the \$50,000.00 limit of UIM coverage in Lunsford's NCFB policy. I would hold that, because the sum of the stacked UIM coverage (\$100,000.00) is greater than the bodily injury liability limit of the Nationwide policy (\$50,000.00), the tortfeasor's car (Chapman's) is an underinsured high-way vehicle.

**CONCLUSION**

Chapman's insurance policy states that it must be adjusted to com- port with our FRA. Under our FRA, Chapman's vehicle fits the definition of an "underinsured motor vehicle." As Chapman's vehicle is an under- insured motor vehicle under North Carolina law, Lunsford is entitled to judgment on the pleadings and the \$50,000.00 of UIM coverage under her NCFB insurance policy.

I respectfully dissent and would reverse.<sup>2</sup>

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2. I do not address the issue of which insurer providing UIM coverage is entitled to a credit for the payment of liability insurance by Nationwide because Nationwide is not a party to this action, despite our prior language that "[w]hen there is more than one UIM carrier involved, allocation of the credit for liability payments is necessary." *Benton*, 195 N.C. App. at 95, 671 S.E.2d at 35 (citing *Onley v. Nationwide Mutual Ins. Co.*, 118 N.C. App. 686, 691, 456 S.E.2d 882, 885 (1995)).

**PADILLA v. WHITLEY DE PADILLA**

[271 N.C. App. 246 (2020)]

FELIX C. PADILLA, PLAINTIFF

v.

KELLY D. WHITLEY DE PADILLA, DEFENDANT

No. COA19-478

Filed 5 May 2020

**Child Custody and Support—modification of custody—substantial change in circumstances—positive changes for non-custodial parent**

The trial court's modification of custody to allow the father greater visitation and parental rights was not an abuse of discretion where father demonstrated numerous positive changes in his life—including having more stability with regard to his housing and personal relationships and addressing his mental health issues—to meet his burden of showing a substantial change in circumstances.

Appeal by Defendant from order entered 12 December 2018 by Judge Amanda L. Maris in Durham County District Court. Heard in the Court of Appeals 31 October 2019.

*No brief filed for Plaintiff-Appellee.*

*Foil Law Offices, by N. Joanne Foil and Laura E. Windley, for Defendant-Appellant.*

DILLON, Judge.

Defendant Kelly D. Whitley de Padilla (“Mother”) appeals from an order (“2018 Order”) modifying the parties’ child custody arrangements. Specifically, Mother disagrees with the extension of rights given to Plaintiff Felix C. Padilla (“Father”) in the 2018 Order.

**I. Background**

Mother and Father were married from 2005 until 2014 and have two minor children together. The parties have been disputing child custody orders since 2015.

In 2016, the trial court entered an order (“2016 Order”) granting sole custody of the children to Mother and granting Father very minimal rights to visitation. The trial court's 2016 Order was based substantially on findings concerning Father's unhealthy relationship with his then girlfriend, Father's mental health issues, and Father's unstable living conditions.



**PADILLA v. WHITLEY DE PADILLA**

[271 N.C. App. 246 (2020)]

Sometime later, Father moved the trial court for an order modifying the custody arrangement. After a hearing on the matter, the trial court entered its 2018 Order which maintained primary physical custody of the children with Mother, but which granted Father greater visitation and parental rights. Mother timely appealed the 2018 Order.

**II. Standard of Review**

In reviewing the trial court's decision to modify a prior custody order, "the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003) (citation omitted). However, "findings of fact not having been excepted to are presumed to be supported by the evidence and are binding on appeal." *James v. Pretlow*, 242 N.C. 102, 104, 86 S.E.2d 759, 761 (1955) (internal quotation marks omitted) (citation omitted). Conclusions of law are reviewed *de novo* by this Court. *See In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019).

Further, as our Supreme Court has recognized, "[i]t is a long-standing rule that the trial court is vested with broad discretion in cases involving child custody." *Pulliam v. Smith*, 348 N.C. 616, 624, 501 S.E.2d 898, 902 (1998) (citation omitted). And, therefore, the decision of the trial court should not be upset on appeal "absent a clear showing of [an] abuse of discretion." *Id.* at 631, 501 S.E.2d at 906 (internal quotation marks omitted) (citation omitted).

**III. Analysis**

Our Supreme Court has held that a custody order may be modified "if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody." *Shipman*, 357 N.C. at 474, 586 S.E.2d at 253 (internal quotation marks omitted) (citation omitted). The burden of proving that there has been a substantial and material change of circumstances affecting the minor child is on the moving party, which here is Father. *See Blackley v. Blackley*, 285 N.C. 358, 362, 204 S.E.2d 678, 681 (1974).

Mother argues that Father has failed to meet his burden as there has been no adverse change concerning her care for the children and, therefore, there is no reason to change the custody arrangements. However, our Supreme Court has instructed that "[w]hile allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, *beneficial* to the child[ren] may also warrant a change in

**PADILLA v. WHITLEY DE PADILLA**

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custody.” *Shipman*, 357 N.C. at 473-74, 586 S.E.2d at 253 (emphasis added) (internal marks omitted). Citing *Shipman*, our Court, in a case similar to the present case, has recognized that a changed circumstance justifying custody modification does not require a showing that something adverse has happened regarding the children’s care, but can be justified based on the positive change in behavior in the non-custodial parent:

If Father . . . can show he has changed and can provide a safe and loving environment for [his child], he has the same opportunity as any parent to request a change in custody based upon a substantial change in circumstances which would positively affect the minor child; *his positive behavior* could be such a change.

*Huml v. Huml*, \_\_ N.C. App. \_\_, \_\_, 826 S.E.2d 532, 549-50 (2019) (emphasis in original) (citation omitted).

Here, in its 2018 Order, the trial court essentially found that there had been many *positive* changes regarding Father’s behavior and lifestyle since the entry of the 2016 Order and that it would be now in the children’s best interest to have a more meaningful relationship with their father. For instance, the trial court found that Father is no longer dating the woman with whom he had the affair (Finding 24); Father is not dating anyone (Finding 25); Father’s old girlfriend will not interfere with Father’s ability to be a good father, and it will benefit the children to have contact with Father at school events (Finding 26); Father has stable housing as he has an apartment for the period of a 15-month lease, suitable for his children (Findings 27 and 70); though Father had once abandoned his kids, he now has a changed attitude and wants to spend time with them (Findings 31-32); and Father has taken great lengths to address his own mental health needs (Findings 46 and 59). The trial court ultimately found that a modification of custody to allow Father more contact with his children would be in the best interest of the children (Finding 84).

It is certainly not an abuse of discretion for a trial court to determine that it is in the best interest of children for them to have a meaningful relationship with *both* of their parents. Here, though, when the 2016 Order was entered, Father had a number of issues that he needed to deal with before it could be said that the children’s welfare would benefit from extensive contact with him. In its 2018 Order, the trial court has determined that Father has adequately dealt with his issues. And though perhaps nothing has changed with Mother’s continued ability to provide a safe, loving environment for the children, something substantial has

**QUACKENBUSH v. GROAT**

[271 N.C. App. 249 (2020)]

changed. Father's circumstances have improved. The children now have the opportunity to develop a more meaningful relationship with their father, while maintaining their healthy relationship with their mother.

**IV. Conclusion**

We conclude that the trial court did not abuse its discretion by modifying custody.

**AFFIRMED.**

Judges DIETZ and YOUNG concur.

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RACHEL QUACKENBUSH, PLAINTIFF  
v.  
KENNETH GROAT, DEFENDANT

No. COA19-415

Filed 5 May 2020

**Domestic Violence—protective order—motion to dismiss complaint—sufficiency of allegations—attachments to complaint**

In a hearing seeking a domestic violence protective order, the trial court erred when it did not consider the detailed allegations contained in file-stamped pages attached to the AOC complaint form and dismissed the complaint for failure to state a claim. Although the completed complaint form did not directly reference the attachments, they were part of the filed complaint served on defendant, they contained sufficient allegations to state a claim under Chapter 50B, and they gave defendant proper notice of the allegations.

Appeal by plaintiff from order entered 19 December 2018 by Judge Donna F. Forga in District Court, Jackson County. Heard in the Court of Appeals 30 October 2019.

*Legal Aid of North Carolina, Inc., by Elysia Prendergast Jones, Suzanne Saucier, Devin Trego, TeAndra Miller and Celia Pistolis, for plaintiff-appellant.*

*No brief filed for defendant-appellee.*

## QUACKENBUSH v. GROAT

[271 N.C. App. 249 (2020)]

STROUD, Judge.

Plaintiff appeals the dismissal of her complaint for a domestic violence protective order against defendant. Because the plaintiff's complaint, including the attached sheets filed with the complaint, stated sufficient factual allegations to establish a claim under Chapter 50B, the trial court erred by granting defendant's motion to dismiss the complaint. We reverse the trial court's order of dismissal and remand for further proceedings.

## I. Background

On 13 December 2018, plaintiff filed a "COMPLAINT AND MOTION FOR DOMESTIC VIOLENCE PROTECTIVE ORDER" against her husband, defendant. Plaintiff alleged that defendant had been verbally abusive to her and her children and her daughter had disclosed sexual abuse committed by defendant to a school counselor. The same day plaintiff's complaint was filed, an *ex parte* domestic violence protection order ("DVPO") was entered ordering defendant to stay away from the home and the children's schools. A hearing was scheduled for 19 December 2018 for consideration of entry of a DVPO.

On 19 December 2018, when the case was called for hearing on return of the *ex parte* order, defendant's attorney made an oral motion to dismiss the plaintiff's complaint under North Carolina General Statute § 1A-1, Rule 12(b)(6) and this Court's case of *Martin v. Martin*, \_\_\_ N.C. App. \_\_\_, 822 S.E.2d 756 (2018).<sup>1</sup> *Martin* was filed 18 December 2018, and the hearing in this case was conducted on 19 December 2018, but on 8 February 2019, a petition for rehearing was allowed, and on 16 July 2019 a new opinion was issued superseding the former version of the opinion upon which the trial court relied. See *Martin v. Martin*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 832 S.E.2d 191, 194-95 (2019). Based upon the former *Martin* opinion, the trial court dismissed plaintiff's complaint for "due process" violations against defendant because plaintiff's allegations were not specific enough. Plaintiff appeals.

## II. Standard of Review

Plaintiff contends that the trial court erred in granting defendant's motion to dismiss her complaint.

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1. *Martin* is not identified by name but from the context of the transcript, which is eleven pages in its entirety, it is clear defendant's counsel and the trial court were referring to *Martin*.

**QUACKENBUSH v. GROAT**

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The standard of review of an order dismissing a complaint for failure to state a claim upon which relief can be granted, G.S. § 1A-1, Rule 12(b)(6), is to determine whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory. A complaint may be dismissed pursuant to Rule 12(b)(6) if no law exists to support the claim made, if sufficient facts to make out a good claim are absent, or if facts are disclosed which will necessarily defeat the claim.

*Hargrove v. Billings & Garrett, Inc.*, 137 N.C. App. 759, 760–61, 529 S.E.2d 693, 694 (2000) (citations and quotation marks omitted).

**III. Attachments to Form Complaint**

Because the trial court’s dismissal of plaintiff’s complaint was based upon defendant’s motion to dismiss based upon a lack of sufficient detail in the allegations of domestic violence, we will address plaintiff’s second issue on appeal first, regarding whether the trial court erred by failing to consider several pages of attachments to the complaint.

The order dismissing plaintiff’s claim was on the form “Domestic Violence Order of Protection” AOC-CV-305 Rev 12/15. (Original in all caps.). Only conclusion of law number 5 was marked: “The plaintiff has failed to prove the grounds for issuance of a domestic violence protective order.” But no evidentiary hearing was held, and the trial court clearly dismissed the complaint based upon defendant’s oral motion to dismiss<sup>2</sup> when defendant argued,

It has to be in the body of the Complaint. It doesn’t say -- like Paragraph 4 doesn’t say “see additional” -- like I understand you run out of room. But it doesn’t say that. So these aren’t necessarily verified Pleadings within that. These are just email attachments or documents that have been stapled to the back of a page. And even by then, they fail. But like Paragraph 4 which lists out what happened, it has a period, not “see Attachment 1, 2, 3 and 4.” The same with No. 5. The problem with those is that I don’t even know what these attachments are. Are they sworn to? Are they verified? I have no idea.

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2. Defendant’s filed answer did not include a motion to dismiss based upon Rule 12(b)(6), but it was *signed* on 17 December 2018, one day before *Martin* was issued. (Emphasis added.)

## QUACKENBUSH v. GROAT

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In rendering the ruling, the trial court stated its rationale as follows:

COURT: And again, there's nothing in the Complaint referencing those attachments?

MS. HUGHES: Yes, your Honor.

COURT: Okay. Then based on the Court of Appeals last case<sup>[3]</sup> which stated "it's clear that the plaintiff/wife testified several alleged actions of domestic violence that were not pleaded in her Complaint, the Court held that that -- that the protection order against the defendant was remanded to the trial for further proceedings consistent with the holding, that they hold that the admission of testimony of domestic violence not otherwise pleaded in the Complaint in a motion for domestic violence protective order violates the defendant's rights to due process." So based on that violation of the defendant's rights to due process, your motion to dismiss is allowed.

Plaintiff filed her complaint *pro se* and it was handwritten on the form AOC-CV-303 "COMPLAINT AND MOTION FOR DOMESTIC VIOLENCE PROTECTIVE ORDER[.]" At the top of the form, just below the case caption and preceding the numbered paragraphs of the allegations of the complaint, the form includes instructions as follows: "Check only boxes that apply and fill in the blanks. *Additional sheets may be attached.*" (Emphasis added). Plaintiff marked the boxes numbered 4, 5, 6, 7, 8 and 11, and she wrote some allegations in the provided blank lines for all but paragraph 6, which has no blank for additional information. There were twelve additional sheets attached to the complaint, with detailed allegations of dates and events.

The additional pages were also file-stamped along with complaint on 13 December 2018.<sup>4</sup> The attached pages included three pages of notes as to specific dates and details of the allegations in the complaint, a domestic violence victim's statement, a safety assessment, and a safety agreement. The attached pages noted the paragraphs of the form complaint to which the information on that page related. The first three pages of the attachment each have "#4" handwritten at the top and are typed notes with dates and times and detailed allegations of instances of defendant

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3. The trial court was referring to *Martin* issued the previous day.

4. The first page of the complaint and the Servicemembers Civil Relief Act Affidavit were file-stamped at 2:43 pm and the first page of the attachments at 2:45 pm. The Affidavit of Status of Minor Child was stamped at 3:15 pm.

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getting upset because plaintiff would not have sex with him and pushing her; of defendant yelling at Tamara<sup>5</sup> in Wendy's, where he sat by himself and then threw a hamburger at Tamara; and of several other instances of alleged verbal abuse of plaintiff. The next page has "#5" written at the top and is a form entitled "Domestic Violence Victims Statement[.]" with handwritten allegations and signed by plaintiff on 13 December 2018, and the following page, also noted as "#5" is the first page of a six-page "North Carolina Safety Assessment" dated 12 December 2018, regarding the report to the Department of Social Services of alleged sexual abuse of Tamara by defendant. Plaintiff's complaint was sworn and subscribed before the Assistant Clerk of Superior Court.<sup>6</sup> The trial court issued an "Ex Parte Domestic Violence Order of Protection[.]" (original in all caps), and the findings in the *ex parte* order included information from the attachments to the complaint. The summons and complaint were served on Defendant on 14 December 2018, and on 19 December 2018 he filed an answer in which he admitted some allegations, denied others, and requested that plaintiff's complaint be dismissed.

While plaintiff did not use legalese in her complaint, the attachments were included with the filed complaint and the purpose of each attachment was obvious by the numbers on the attached pages. Defendant did *not* contend to the trial court that he did not receive the attached pages with the filed complaint or that they were added after the complaint was filed. Defendant's argument was simply that the form complaint did not state "see [a]ttachment" or "see additional[.]" But even a brief examination of the complaint reveals that the numbered attachments each relate to a particular paragraph number in the form complaint. For example, as noted, the pages of the attachments with the large "#4" at the top are providing further detail to paragraph 4 on the complaint form about defendant being verbally abusive to her and the children.

The Rules of Civil Procedure require notice pleading, with a policy "to resolve controversies on the merits . . . rather than on technicalities of pleading." *Smith v. City of Charlotte*, 79 N.C. App. 517, 528, 339 S.E.2d 844, 851 (1986).

A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer

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5. We have used pseudonyms for the minor children.

6. The form complaint includes language and signature blocks for verification under oath, although North Carolina General Statute § 50B-2 does *not require* that the complaint be "sworn to" or "verified" as argued by defendant's counsel before the trial court. *See* N.C. Gen. Stat. § 50B-2(a) (2017).

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justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

*Harris v. Maready*, 311 N.C. 536, 544, 319 S.E.2d 912, 917–18 (1984) (citation and ellipses omitted).

The better practice would be for plaintiff to note on the form complaint that additional pages are attached, but the complaint as filed included the attachments and made the purpose of the attached pages clear. From defendant's argument to the trial court, there is no question defendant received the full complaint, with all attached pages, and he knew what they meant. It is not entirely clear whether the trial court considered the attached pages, although it appears from the colloquy at the hearing the trial court accepted defendant's argument that they should not be considered for purposes of the motion to dismiss. But all of the pages of the complaint, including the attached pages, were part of the complaint when it was filed; the trial court considered all of the pages when issuing the *ex parte* order; and defendant was served with the entire complaint. We will consider all of the pages for purposes of this appeal.

#### IV. Motion to Dismiss

North Carolina General Statute § 50B-2(a) sets forth the requirements for a complaint seeking a DVPO:

Any person residing in this State may seek relief under this Chapter by filing a civil action or by filing a motion in any existing action filed under Chapter 50 of the General Statutes *alleging acts of domestic violence against himself or herself or a minor child who resides with or is in the custody of such person.*

N.C. Gen. Stat. § 50B-2(a) (2017) (emphasis added). Allegations of domestic violence include

the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:



## QUACKENBUSH v. GROAT

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- (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
- (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
- (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

N.C. Gen. Stat. § 50B-1 (2017).

Before the trial court, defendant made an oral motion to dismiss based upon Rule 12(b)(6) and contended that based on *Martin v. Martin*, \_\_\_ N.C. App. \_\_\_, 822 S.E.2d 756 plaintiff's allegations were not sufficiently specific to afford defendant due process. The trial court agreed. Again, *Martin* was filed 18 December 2018, and the hearing in this case was conducted on 19 December 2018, but on 8 February 2019, a petition for rehearing was allowed, and on 16 July 2019 a new opinion was issued superseding the former version of the opinion upon which the trial court relied. See *Martin v. Martin*, \_\_\_ N.C. App. \_\_\_, 832 S.E.2d 191, 194-95 (2019).

The issue presented in *Martin* was *not* whether the plaintiff's complaint should be dismissed under Rule 12(b)(6) for failure to state a claim, and the defendant in *Martin* did not contend the complaint failed to state a claim upon which relief may be granted. See *generally Martin*, \_\_\_ N.C. App. \_\_\_, 832 S.E.2d 191. Thus, *Martin* did *not* involve a motion to dismiss the complaint for failure to state a claim. See *id.* The specific relevant issue in *Martin* was whether "the trial court erred by . . . allowing Plaintiff-Wife to present evidence of alleged incidents of domestic violence of which Defendant-Husband did not receive notice before trial, in violation of his due process rights[.]"<sup>7</sup> *Id.* at \_\_\_ 832 S.E.2d at 195. In *Martin*, the trial court held a hearing on the domestic violence claim, and the defendant objected to admission of evidence regarding some incidents of domestic violence which he claimed were not plead and of which he did not have sufficient notice to defend himself. See *id.* at \_\_\_, 832 S.E.2d at 196. This Court determined that the trial court should not have based a finding of domestic violence solely on evidence

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7. In context, the word "alleged" is referring to the wife's allegations in her trial testimony. There was no question she did not "allege" certain specific acts in the complaint as she did in her testimony; this was the basis of husband's objection. *Martin*, \_\_\_ N.C. App. at \_\_\_, 832 S.E.2d at 196.

## QUACKENBUSH v. GROAT

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presented by the plaintiff at trial which she had not mentioned in the complaint, based upon defendant's objection to that evidence at trial. *See id.* at \_\_\_, 832 S.E.2d at 196-97.<sup>8</sup>

Although *Martin* does not directly address a ruling on a motion to dismiss under Rule 12(b)(6), it does note that a complaint under Chapter 50B is subject to the same standards of notice pleading as any other claim:

North Carolina remains a notice-pleading state, which means that a pleading filed in this state must contain a short and plain statement of the claim sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief. A complaint is adequate, under notice pleading, if it gives a defendant sufficient notice of the nature and basis of the plaintiff's claim and allows the defendant to answer and prepare for trial. While Rule 8 does not require detailed fact pleading, it does require a certain degree of specificity, and sufficient detail must be given so that the defendant and the Court can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for relief.

*Id.* at \_\_\_, 832 S.E.2d at 195 (citations, quotation marks, ellipses, and brackets omitted).

Focusing now on plaintiff's last two arguments regarding the sufficiency of her claim for purposes of Rule 12(b)(6) and notice pleading, we turn to her complaint. Plaintiff alleged that defendant was "verbally abusive to [her] and [her] children" and her daughter had reported "allegations of sexual abuse committed by" defendant to her school counselor. The complaint gave additional details regarding some of the alleged acts of abuse, with sufficient detail "so that the defendant and the Court can obtain a fair idea of what the plaintiff is complaining, and can see that there is some basis for relief." *Id.* at \_\_\_, 832 S.E.2d at 195. Plaintiff's allegations state a claim upon which relief may be granted as they are allegations of domestic violence against her and her children. *See* N.C. Gen. Stat. §§ 1A-1, Rule 12(b)(6); 50B-1, -2. *See generally* N.C.

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8. To the extent the defendant did not object to the plaintiff's testimony of other incidents of domestic violence not specifically mentioned in her complaint, this Court held the husband had waived review of the issue. *See Martin*, \_\_\_ N.C. App. at \_\_\_, 832 S.E.2d at 196-97.

**REGISTER v. WRIGHTSVILLE HEALTH HOLDINGS, LLC**

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Gen. Stat. § 1A-1, Rule 12(b)(6); *Martin*, \_\_\_ N.C. App. \_\_\_, 832 S.E.2d at 195. Therefore, we reverse and remand.

**V. Conclusion**

Because plaintiff's complaint alleged facts sufficient to state a claim for relief under Chapter 50B, we reverse the trial court's order dismissing the claim and remand for further proceedings.

REVERSED and REMANDED.

Judges ZACHARY and MURPHY concur.

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ANTHONY L. REGISTER, ADMINISTRATOR CTA OF THE ESTATE OF  
WILLIAM CURTIS ROGERS, PLAINTIFF

v.

WRIGHTSVILLE HEALTH HOLDINGS, LLC, D/B/A AZALEA HEALTH AND REHAB  
CENTER, AND SABER HEALTHCARE HOLDINGS, LLC, DEFENDANTS

No. COA19-977

Filed 5 May 2020

**1. Arbitration and Mediation—motion to compel arbitration—existence of agreement to arbitrate—sufficiency of evidence**

In a negligence action filed against two elder care businesses (defendants) by the administrator of a deceased patient's estate (plaintiff), the trial court properly denied defendants' motion to compel arbitration where plaintiff submitted affidavits denying that the signature shown on defendants' copy of the arbitration agreement belonged to the patient's health care agent and defendants did not present any evidence in rebuttal, and therefore defendants failed to prove the existence of a valid arbitration agreement between the parties. Plaintiff's untimely submission of the affidavits did not prejudice defendants where the trial court provided defendants extra time to respond to them. Further, the trial court was not required to enter specific findings of fact regarding the affidavits' truthfulness where it adequately stated its bases for denying defendants' motion.

**2. Arbitration and Mediation—right to compel arbitration—waiver—acts inconsistent with arbitration—prejudice to nonmoving party**

In a negligence action filed against two elder care businesses (defendants) by the administrator of a deceased patient's estate

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(plaintiff), the trial court properly denied defendants' second motion to compel arbitration because defendants waived any right to arbitrate by withdrawing their first motion to compel arbitration, emailing plaintiff's counsel to say they would not pursue that motion any further, objecting to discovery requests regarding the alleged arbitration agreement between the parties, and waiting fifteen months to file the second motion. Defendants' actions were inconsistent with any claimed right to arbitrate and prejudiced plaintiff, who incurred significant litigation expenses that could have been avoided if defendants had not withdrawn their first motion.

Appeal by Defendants from order entered 13 June 2019 by Judge R. Kent Harrell in New Hanover County Superior Court. Heard in the Court of Appeals 18 March 2020.

*Henson Fuerst, P.A., by Rachel Fuerst, Carmaletta Henson, and Shannon Gurwitch, and Hall and Green, LLP, by John F. Green and Alex Hall, for the Plaintiff.*

*Young Moore and Henderson, P.A., by Madeleine M. Pfefferle, Dana H. Hoffman, and Angela Farag Craddock, for the Defendants.*

BROOK, Judge.

Wrightsville Health Holdings, LLC, doing business as Azalea Health and Rehab Center, and Saber Healthcare Holdings, LLC (collectively, "Defendants"), appeal from an order denying Defendants' motion to stay the proceedings and compel arbitration on 13 June 2019. Because we hold that Defendants failed to prove the existence of a valid arbitration agreement and, in the alternative, that they waived any contractual right to arbitrate, we affirm.

### I. Factual and Procedural Background

Anthony L. Register ("Plaintiff"), administrator of the estate of William S. Rogers, initiated this suit on 28 August 2017, alleging that Defendants were negligent in their treatment and care of Mr. Rogers while he was a patient and resident at Defendants' skilled nursing facility. Plaintiff is married to Mr. Rogers's daughter, Lisa Register, who had the authority to make healthcare decisions on behalf of Mr. Rogers under a health care power of attorney. Plaintiff brought claims for medical negligence, administrative/corporate negligence, ordinary negligence, a

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survival action and wrongful death action, and asserted a claim for punitive damages.<sup>1</sup>

Defendants filed an answer to Plaintiff's complaint on 30 October 2017; their answer included a motion to compel arbitration. Plaintiff served discovery requests on Defendants, including requests for production of information and documents related to the alleged arbitration agreement. A hearing was set on the motion to compel arbitration; however, on 15 February 2018, Defendants withdrew their motion to compel arbitration. In Defendants' responses to Plaintiff's first set of interrogatories and requests for production, Defendants objected to questions relating to the alleged arbitration agreement, noting they had withdrawn their motion to compel arbitration.

Prior defense counsel filed a motion to withdraw as counsel on 6 March 2019, and the trial court allowed the motion the same day. Defendants then filed an amended Rule 15 motion and motion to stay the proceedings and compel arbitration on 29 May 2019; the motion included an electronic record that Defendants alleged was an arbitration agreement signed by Ms. Register when Mr. Rogers was admitted to Defendants' facility. On 4 June 2019, Plaintiff responded to Defendants' motion and included affidavits of Plaintiff and Ms. Register denying that Ms. Register signed the alleged arbitration agreement.

A hearing was held on Defendants' new motion to compel arbitration before Judge Harrell on 5 June 2019. At the hearing, Defendants objected to the affidavits as untimely because they were served on the eve of the hearing. The trial court offered Defendants a continuance to a later hearing date so that Defendants could prepare a response to the affidavits; Defendants declined the trial court's offer. The trial court accepted the affidavits.

The trial court denied Defendants' motion to compel arbitration by written order on 13 June 2019 and made the following relevant findings of fact:

1. That this action was commenced by the filing of the complaint by the Plaintiff on August 28, 2017.
2. That the defendants filed their answer on October 30, 2017. As part of that answer, the defendants included a motion to compel arbitration.

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1. Plaintiff's initial suit included as defendants Jeffrey D. Seder, M.D., and Brunswick Cardiology, P.C. Plaintiff voluntarily dismissed his claims against Dr. Seder and Brunswick Cardiology without prejudice on 30 April 2019.

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3. Plaintiff served discovery requests on defendants which included requests for information and documents directly related to the alleged arbitration agreement.

4. The [first] motion to compel arbitration was noticed for hearing by the defendants on January 11, 2018 to be heard February 28, 2018

5. On February 9, 2018 counsel for the defendants emailed counsel for the plaintiff and stated “We do not intend to move forward with our motion to compel arbitration . . . I think you had served some discovery with respect to the arbitration issue. Please let me know if we still need to respond to that in light of our motion withdrawal.”

6. That on February 14, 2018, the defendants filed with the court a Withdrawal of Motion which stated that defendants were withdrawing their motion to compel arbitration.

7. In response to plaintiff’s first set of interrogatories and request for production of documents, the defendants lodged objections to the relevancy of questions relating to the alleged arbitration agreement and noted that it had withdrawn its motion to compel arbitration.

8. Plaintiff did not seek orders to compel productions to those specific discovery requests based on the defendant having withdrawn the motion to compel arbitration.

9. Following their withdrawal of the motion to compel arbitration, the defendants took the following actions:

a. Defendants served written interrogatories and request for production of documents on plaintiff on February 20, 2018.

b. Defendants circulated their proposed revised discovery scheduling order on February 26, 2018.

c. Defendants filed a motion requesting court involvement in the preparation of the discovery scheduling order on March 27, 2018.

d. Defendants noticed the depositions of Lisa Register and Tina Glisson on May 30, 2018. In defendants [sic] deposition of Lisa Register, counsel did not address any issues relating to the purported arbitration agreement which forms the basis of this motion.

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e. Defendants took part in and questioned [ten] witnesses at depositions . . . .

. . .

f. Defendants agreed to terms of a consent order compelling it to respond to certain discovery requests of the plaintiff on December 3, 2018.

10. On March 6, 2019, counsel for the defendants filed a motion to withdraw due to issues that had arisen in their representation of the defendants. Counsel informed the court that Dana Hoffman (present counsel) had been retained, had been provided all discovery and was prepared to take over representation. In statements to the court, counsel indicated that “[h]er involvement will not change anything in terms of discovery scheduling order, the trial date, would not prejudice the administration of this case in any way. We’re not asking for any modification to DSO [Discovery Scheduling Order], any attempt to move the trial date, so I don’t think it’s in any way prejudicial to the plaintiffs in this case.”

11. Following the appearance of Ms. Hoffman as counsel for the defendants, interrogatories and requests for production of documents were sent by defendants to Dr. Jeffrey Seder and Brunswick Cardiology . . . on April 4, 2019.

12. Defendants then forwarded their second set of interrogatories and request for production of documents to the plaintiff on April 5, 2019.

13. On April 29, 2019 defendants filed a motion for protective order to quash the 30(b)(6) Notice of Deposition served by plaintiff on Defendant Saber Healthcare Holdings, LLC and noticed the same for hearing.

14. On May 8, 2019 in a hearing before the Honorable Paul Quinn on plaintiff’s motion to compel, defendants admitted to violation of the prior order of the Court on December 3, 2018 compelling [sic] production of certain discovery. An order from that hearing addressing sanctions is still outstanding.

15. The defendants were also ordered by Judge Quinn in a written order entered May 13, 2019 to compel production

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of information which defendants had failed to provide in response to other discovery requests. . . .

16. In support of their motion to compel arbitration, defendants produced a copy of an electronic record which purports to be an Arbitration Agreement signed at the time of the decedent's admission to the defendant's facility. The agreement purports to bear the signature of Lisa Register who was the health care power of attorney for the decedent.

17. Lisa Register and plaintiff in this action have filed affidavits in opposition to the motion to compel arbitration which deny that the signature shown on the electronic record is the signature of Lisa Register.

18. Defendants have failed or refused to provide information about the employee who purportedly signed the arbitration agreement on behalf of defendants. Plaintiff has been unable to complete discovery on issues relating to the arbitration agreement and reasonably relied on the defendants [sic] withdrawal of the motion and defendants [sic] statements that they would not move forward with the motion in not pursuing a motion to compel production of the information objected to in discovery requests.

19. As part of their preparation for litigation, counsel for the plaintiff retained a medical records expert who has reviewed the audit history for electronic records provided by defendants. The purported arbitration agreement was not provided in discovery and plaintiff was not able to have their expert review the audit trail for this document.

20. Plaintiffs have incurred \$75,000.00 in litigation expenses including retention of expert witnesses and costs of discovery. Those expenses would not have been incurred if defendants had pursued its motion to compel arbitration at the earlier stage of this proceeding.

21. Counsel for the plaintiff is not paid hourly but have expended substantial time in preparation for and completion of numerous depositions, court hearings including motions to compel production of discovery responses, and completion of discovery responses.

. . .



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25. More than 15 months elapsed after defendants withdrew the motion to compel arbitration before attempting to resurrect this issue.

The trial court then entered the following conclusions of law:

2. At an early stage of the litigation, defendants notified plaintiff of its intent to enforce a purported arbitration agreement but rather than simply removing the motion from a hearing calendar, the defendant withdrew the motion entirely.

...

5. Defendants have failed to carry their burden of establishing the validity of an enforceable arbitration agreement.

6. Even if the arbitration agreement were valid, withdrawing the motion to compel arbitration, indicating to the plaintiff that the motion would not be pursued, objecting to discovery responses from the plaintiff on the basis that the motion had been withdrawn and express assertions to the court that no impact on the course of litigation would be caused by withdrawal of counsel constitute actions inconsistent with arbitration.

7. That defendants [sic] actions have resulted in prejudice to the plaintiff in the expense of over \$75,000.00 in costs incurred in pursuit of claims, completion of a large number of depositions that would have otherwise been unavailable in arbitration, and hundreds of hours of attorney time incurred in conducting hearings to compel defendants to respond to discovery and to seek sanctions for defendants [sic] failure to comply with [a] court order to compel that production.

...

9. The length of delay in asserting the right to arbitrate has been a factor considered in determining if waiver has occurred. Elliott v. KB Home N.C., Inc., 231 N.C. App. 332, 337, 752 S.E.2d 694, 698 (2013)[.]

10. When a party has allowed significant time to pass, participated in litigation involving judicial intervention and participation, and thereby caused the expenditure of

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significant expense, including attorneys' fees, the strong public policy in favor of arbitration is thereby diminished because the primary benefit of arbitration, namely expedited hearing of issues at a reduced cost to the parties, has been lost. Elliott v. KB Home N.C., Inc., 231 N.C. App. 332, 338, 752 S.E.2d 694, 698 (2013)[.]

11. Defendants cannot engage in protracted litigation and then assert a right to arbitrate when the course of that litigation has not been favorable to them, particularly where they are subject to contempt and sanction orders from the court for their failure to comply with prior court orders.

Concluding that Defendants had failed to meet their burden to establish the existence of a valid arbitration agreement, and in the alternative that Defendants had waived any right to compel arbitration, the trial court denied Defendants' motion to compel arbitration on 13 June 2019. Defendants filed notice of appeal on 20 June 2019.

## II. Jurisdiction

An appeal to this Court is proper from an order denying a motion to compel arbitration. N.C. Gen. Stat. § 1-569.28 (2019).

## III. Analysis

Defendants allege that the trial court erred in finding that Defendants failed to establish a valid and enforceable arbitration agreement and in finding that Defendants waived any right to compel arbitration. We disagree and affirm the order of the trial court.

### A. Existence of Valid Agreement

#### i. Standard of Review

"The trial court's findings regarding the existence of an arbitration agreement are conclusive on appeal where supported by competent evidence, even where the evidence might have supported findings to the contrary." *Sciolino v. TD Waterhouse Investor Servs.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Eley v. Mid/East Acceptance Corp. of N.C., Inc.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (internal marks and citation omitted). "Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate." *Sciolino*, 149 N.C. App. at 645, 562 S.E.2d at 66.

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## ii. Merits

[1] Defendant, as the party seeking to compel arbitration, bears the burden of showing that a valid arbitration agreement exists. *Routh v. Snap-On Tools Corp.*, 108 N.C. App. 268, 271-72, 423 S.E.2d 791, 794 (1992). “The law of contracts governs the issue of whether an agreement to arbitrate exists.” *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005). In North Carolina, “a valid contract requires (1) assent; (2) mutuality of obligation; and (3) definite terms.” *Charlotte Motor Speedway, LLC v. County of Cabarrus*, 230 N.C. App. 1, 7, 748 S.E.2d 171, 176 (2013). Arbitration will not be compelled in the absence of such a showing. *Routh*, 108 N.C. App. at 271, 423 S.E.2d at 794.

Defendants first argue that the trial court’s finding that they failed to meet their burden was unsupported by competent evidence. Chiefly, they contend, “Ms. Register’s act of signing the Arbitration Agreement is sufficient to establish that the agreement is a valid agreement to arbitrate and Plaintiff is bound by the obligation to do so.” However, Plaintiff contests whether Ms. Register actually signed the agreement, not whether the agreement would have been valid had she done so. As explained below, because competent evidence supports a finding that Defendants failed to establish assent—an essential element of a valid contract—we affirm the trial court’s finding that Defendants did not show that a valid arbitration agreement exists, and thus we affirm its order denying Defendants’ motion to compel arbitration.

Defendant concedes that the trial court admitted the affidavits of Plaintiff and Ms. Register in a proper exercise of its discretion under North Carolina Rules of Civil Procedure, Rule 6(d). N.C. Gen. Stat. § 1A-1, Rule 6(d) (2019) (granting trial courts the discretion to accept affidavits in support or opposition of motions even when not served upon opposing counsel two days in advance of hearing). Once admitted, affidavits disputing a fact material to Defendant’s burden—here, whether Ms. Register assented to the contract—are competent evidence to support a trial court’s conclusion that a defendant has not met its burden, even though “the evidence might have supported findings to the contrary.” *Sciolino*, 149 N.C. App. at 645, 562 S.E.2d at 66. Further, Defendants did not produce any witnesses or affidavits attesting that Ms. Register did in fact read and sign the arbitration agreement. The trial court was therefore entitled to determine the credibility of the affidavits and to rely on them, as well as to consider the lack of rebuttal evidence from Defendants beyond the purported instrument, to come to the conclusion it did.

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Defendants contend, however, that the affidavits were “inherently incredible” such that they did not constitute “competent evidence.” Specifically, and relying on *In re Foreclosure of Real Prop. Under Deed of Trust from Brown*, 156 N.C. App. 477, 577 S.E.2d 398 (2003), Defendants argue that parties should be apprised of the contents of affidavits submitted by their opponents and allowed to object. In that case, this Court listed several potential ways in which a party could be prejudiced by the admission into evidence of untimely affidavits. *Id.* at 485, 577 S.E.2d at 403-04. But it then upheld the trial court’s admission of affidavits because it appeared the appellants had not been so prejudiced—that is, they had been made aware of the affidavits’ contents and had the opportunity to challenge them. *Id.*, 577 S.E.2d at 404. It is therefore not enough, as Defendants suggest, that there *may* be abstract “concerns about the ability the [sic] of opposing party’s ability to effectively refute new allegations and the inherent credibility of untimely affidavits.”

As Plaintiff notes, the trial court offered Defendants more time to respond to the untimely affidavits pursuant to the discretion Rule 6(d) affords. Once Defendants declined that offer, the trial court in its discretion refused to grant Defendants’ motion to strike the affidavits. In a nearly identical case—one that also concerned the enforcement of an alleged arbitration agreement by an assisted living facility in the wake of an alleged wrongful death—we held that although it was “undisputed that plaintiff failed to serve her opposing affidavit on defendants within two days prior to the trial court’s hearing[,] . . . [t]he trial court did not abuse its discretion when it ‘[took] such other action as the ends of justice require’ and proceeded with the hearing.” *Raper v. Oliver House, LLC*, 180 N.C. App. 414, 418, 637 S.E.2d 551, 554 (2006) (quoting N.C. Gen. Stat. § 1A-1, Rule 6(d)).

Defendants also point to *Johnson v. Crossroads Ford, Inc.*, 230 N.C. App. 103, 108-09, 749 S.E.2d 102, 106-07 (2013), where this Court reversed a trial court’s decision to strike an affidavit offered five days before a hearing. Even putting aside the trial court’s offer here to Defendants to continue the hearing to ensure that Defendants had a chance to fully consider and respond to the affidavits, this Court’s previous holding that a trial court was wrong to exclude affidavits that were timely served would not require us to now find that a trial court committed reversible error by *including* affidavits entered with less notice. *See id.* at 108, 749 S.E.2d at 106 (“[T]he trial court erred by finding that because Woods’ affidavit was presented at the ‘11th hour,’ it was inherently incredible.”). We therefore do not agree with Defendants that “this Court has previously determined that affidavits are inherently incredible when served

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at the eleventh hour to raise entirely new contentions of which defendants had never been made aware.”

Defendants further argue that the trial court erred in failing to make affirmative findings that the affidavits are true or that the signature on the alleged arbitration agreement is not that of Ms. Register. North Carolina law requires that the trial court determine whether a valid arbitration agreement exists as a matter of law. N.C. Gen. Stat. § 1-569.6(b) (2019). We have also required that “the trial court [] state the basis for its decision in denying a defendant’s motion to stay proceedings in order for this Court to properly review whether or not the trial court correctly denied the defendant’s motion [to compel arbitration].” *Steffes v. DeLapp*, 177 N.C. App. 802, 804, 629 S.E.2d 892, 894 (2006).

The trial court has done so here. It concluded as a matter of law that “Defendants have failed to carry their burden of establishing the validity of an enforceable arbitration agreement.” It made findings of fact acknowledging both the contents of the affidavits and Defendants’ failure to produce either the purported agreement or the employee who allegedly signed the agreement on Azalea’s behalf until 29 May 2019, approximately a year and a half after the initiation of the suit. The trial court thereby stated adequate bases for its decision. Because the trial court adequately supported its finding, an affirmative finding that the affidavits were in fact truthful is not required to support the conclusion that Defendants’ burden remains unmet. *See Evangelistic Outreach Ctr. v. Gen. Steel Corp.*, 181 N.C. App. 723, 728, 640 S.E.2d 840, 844 (2007) (holding that “competent evidence supported the trial court’s finding that there was no agreement to arbitrate” without the trial court’s accepting a party’s denial as a fact per se).

Finally, Defendants argue that state and national public policies in favor of arbitration must lead to a conclusion that the trial court erred in denying their motion to compel arbitration. But public policy favoring the enforcement of arbitration agreements and broad constructions of their scope depends on a predicate finding that there exists an arbitration agreement to be enforced and construed. *See Sears Roebuck v. Avery*, 163 N.C. App. 207, 211, 593 S.E.2d 424, 428 (2004) (“[T]his public policy does not come into play unless a court first finds that the parties entered into an enforceable agreement to arbitrate.”). Defendants’ lengthy appeals to public policy therefore put the cart before the horse. Policy plays no part in the trial court’s otherwise routine determination of whether there is a valid contract at all.

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We therefore hold the trial court correctly concluded that Defendants failed to meet their burden of proving the existence of a valid arbitration agreement.

**B. Waiver of Right to Compel Arbitration**

**[2]** Defendants further contend that the trial court erred in concluding, in the alternative, that Defendants waived any right to compel arbitration. We conclude that the trial court did not so err, and we affirm its order.

**i. Standard of Review**

Whether a party has engaged in conduct that constitutes waiver of its contractual right to arbitration is a question of fact. *Cyclone Roofing Co. v. David M. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984). “[T]he trial court’s findings of fact are binding on appeal when supported by competent evidence.” *Herbert v. Marcaccio*, 213 N.C. App. 563, 567, 713 S.E.2d 531, 535 (2011). We apply a “general presumption of correctness [] to a trial court’s findings of fact to its waiver determinations.” *Elliott v. KB Home N.C., Inc.*, 231 N.C. App. 332, 337, 752 S.E.2d 694, 698 (2013). “[T]he question of whether those actions, once found as fact by the trial court, amount to waiver of the right to arbitrate a dispute is a question of law subject to *de novo* review.” *IPayment, Inc. v. Grainger*, 257 N.C. App. 307, 315, 808 S.E.2d 796, 802 (2017).

**ii. Merits**

Public policy favors arbitration because it represents “an expedited, efficient, relatively uncomplicated, alternative means of dispute resolution, with limited judicial intervention or participation, and without the primary expense of litigation—attorneys’ fees.” *Nucor Corp. v. Gen. Bearing Corp.*, 333 N.C. 148, 154, 423 S.E.2d 747, 750 (1992). “Because of the strong public policy in North Carolina favoring arbitration, courts must closely scrutinize any allegation of waiver of such a favored right.” *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876 (internal citation omitted). “[A] party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration.” *Id.* “[T]he party opposing arbitration bears the burden of proving prejudice.” *HCW Ret. & Fin. Servs. v. HCW Emp. Ben. Servs.*, 367 N.C. 104, 109, 747 S.E.2d 236, 240 (2013).

Our courts have found parties to have taken actions inconsistent with a right to arbitrate when they participate in lengthy litigation while doing “nothing to assert any right to arbitrate.” *Elliott*, 231 N.C. App. at

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342, 752 S.E.2d at 700 (involving a three-year period of litigation absent any assertion of a right to arbitrate).

And our courts have indicated that there are several ways in which a party can show prejudice. These include a “delay in the seeking of arbitration” resulting in a party’s “expend[ing] significant amounts of money” in litigation. *Cyclone*, 312 N.C. at 229-30, 321 S.E.2d at 877. The reason is clear enough: “when a party has allowed significant time to pass, participated in litigation involving judicial intervention and participation, and thereby caused the expenditure of significant expense, including attorneys’ fees, the strong public policy in favor of arbitration is thereby diminished.” *Elliott*, 231 N.C. App. at 338, 752 S.E.2d at 698.

We consider below whether Defendants’ actions were inconsistent with a claimed right to arbitration and whether Plaintiff was prejudiced by those actions. Deciding both of these issues in the affirmative, we conclude that Defendants waived any right to arbitrate they may have had.

Here, Defendants filed a withdrawal of their motion to compel arbitration. They also sent an email to Plaintiff’s counsel stating, “[w]e do not intend to move forward with our motion to compel arbitration.” Further, they objected to Plaintiff’s requests for admission regarding the alleged agreement to arbitrate. These actions go beyond merely doing “nothing to assert any right to arbitrate” that our Court found sufficient to waive a right to arbitrate in *Elliott* and are entirely “inconsistent with [a] right to arbitration.” *Id.* at 342, 752 S.E.2d at 700.

Having concluded that Defendants took actions “inconsistent with arbitration,” we turn to whether Plaintiff was prejudiced by Defendants’ actions. *Cyclone*, 312 N.C. at 229, 321 S.E.2d at 876. Plaintiff asserts that Defendants’ delay in reasserting an alleged right to arbitrate prejudiced Plaintiff because Plaintiff was forced to expend significant amounts in litigation. As explained below, we agree.

First, the delay at issue here was consequential. While our Supreme Court found a one-month delay, in which no discovery was conducted and no evidence was lost, did not support a conclusion of prejudice, *id.* at 233, 321 S.E.2d at 878, our Court in *Herbert* concluded that litigation over a two-year period was significant and contributed to our conclusion that there was prejudice to the non-moving party, 213 N.C. App. at 569, 713 S.E.2d at 536. The delay here in asserting a right to arbitrate—after renouncing the same—is substantial, and, as such, bears more in common with *Herbert* than *Cyclone*. Specifically, competent evidence supports the trial court’s finding that “[m]ore than 15 months elapsed



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after [D]efendants withdrew the motion to compel arbitration before attempting to resurrect this issue.” This finding in turn supports the trial court’s conclusion that Defendants waived their alleged right to arbitrate this dispute.

When considering whether a delay in requesting arbitration resulted in significant expense for the party opposing arbitration, the trial court must make findings (1) whether the expenses occurred after the right to arbitration accrued, and (2) whether the expenses could have been avoided through an earlier demand for arbitration.

*Elliott*, 231 N.C. App. at 343, 752 S.E.2d at 701. Because the party opposing arbitration bears the burden of proving prejudice, the non-moving party must present to the trial court actual evidence of the expenses incurred as a result of the moving party’s failure to timely assert a right to arbitration. *See Herbert*, 213 N.C. App. at 569, 713 S.E.2d at 536 (affirming trial court’s finding of significant expense where trial court relied on attorney affidavit and superior court record evidence that the litigation required “significant resources,” although trial court did not find any “specific dollar amounts” of the expense). Our Court has considered fees and other litigation expenses as low as \$10,000 to be prejudicial. *Prime South Homes, Inc. v. Byrd*, 102 N.C. App. 255, 261, 401 S.E.2d 822, 826-27 (1991); *see also Elliott*, 231 N.C. App. at 343, 752 S.E.2d at 701 (concluding \$100,000 in legal fees to be prejudicial); *Moose v. Versailles Condo. Ass’n*, 171 N.C. App. 377, 385, 614 S.E.2d 418, 424 (2005) (affirming trial court’s finding that \$32,854 showed prejudice).

Here, the record supports the trial court’s findings that the delay caused Plaintiff to incur expenses and, thus, the court’s conclusion regarding waiver. Plaintiff’s counsel submitted a sworn affidavit averring that counsel expended approximately \$75,000 in litigation, and that “[a]lmost half of the money has been spent o[n] preparation and taking depositions, travel, and preparation for and travel to multiple Court hearings.” Counsel further averred that Plaintiff would not have hired seven different expert witnesses, participated in four superior court hearings, reserved over a dozen witnesses to appear for a peremptory trial setting on 9 December 2019, taken 12 depositions, or participated in mediation had Defendants not withdrawn their motion to compel arbitration. The trial court assessed this record evidence as credible and found that Plaintiff incurred significant litigation expenses that would not have accrued had Defendants not withdrawn the motion. The trial court further concluded as a matter of law that Plaintiff was prejudiced by expending



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\$75,000.00 in costs [] in pursuit of claims, completion of a large number of depositions that would have otherwise been unavailable in arbitration, and hundreds of hours of attorney time incurred in conducting hearings to compel defendants to respond to discovery and to seek sanctions for defendants [sic] failure to comply with [a] court order to compel that production.

We therefore conclude that competent evidence supports the trial court's findings. These findings, in turn, support the court's conclusion that the Defendants' delay caused Plaintiff to suffer significant expense.

Competent evidence supports the trial court's findings that Defendants acted inconsistent with any claimed right to arbitrate. Competent evidence also supports the court's findings that these actions were to Plaintiff's detriment. These findings support the trial court's conclusion of a waiver of any purported right to arbitrate. "Holding otherwise would defeat, rather than promote, the public policy behind the favor with which the courts of this state generally view arbitration—expediting an efficient and relatively simple means of resolving disputes without the multitude of costs, in both time and money, generally associated with litigation." *Elliott*, 231 N.C. App. at 347, 752 S.E.2d at 703.

#### IV. Conclusion

We conclude that the trial court did not err in concluding that Defendants failed to prove the existence of a valid arbitration agreement. We further conclude that the trial court did not err in finding that, even if there was a valid arbitration agreement, Defendants waived any right to arbitrate. We therefore affirm the order below denying Defendants' second motion to compel arbitration and stay the proceedings.

**AFFIRMED.**

Judges DILLON and COLLINS concur.

**STATE OF N.C. EX REL. POLLINO v. SHKUT**

[271 N.C. App. 272 (2020)]

STATE OF NORTH CAROLINA EX REL. JOSEPH POLLINO AND  
KIMBERLY VANDENBERG, PLAINTIFFS

v.

MARY G. SHKUT, DEFENDANT

No. COA19-601

Filed 5 May 2020

**1. Appeal and Error—mootness—quo warranto action—procedural issues—no public interest exception**

An appeal from an order dismissing a quo warranto action (filed pursuant to N.C.G.S. § 1-516) as untimely was dismissed as moot where the matter in controversy—the manner in which a village council member was appointed—was no longer at issue because the member no longer served on the council. Where the appeal involved non-urgent procedural issues, it did not meet the standard for application of the public interest exception to mootness.

**2. Declaratory Judgments—quo warranto action—request for sanctions—improper procedure**

In a quo warranto action brought by a mayor and village council member (plaintiffs) challenging the appointment of another council member (defendant), which was dismissed for failure to timely effect service, defendant's motion for sanctions against plaintiffs' attorneys—for allegedly violating N.C.G.S. § 1-521 by using public funds for counsel fees—was properly dismissed where the declaratory and injunctive relief sought should have been brought by defendant in a separate civil action, or as a counterclaim or crossclaim in an active proceeding. Although defendant argued on appeal that the trial court could have granted relief by using its inherent authority to discipline attorneys practicing before it, defendant did not cite ethical rules or seek professional discipline in her motion.

Appeal by plaintiffs from orders entered 5 October 2018, 6 December 2018, and 12 March 2019, and appeal by defendant from order entered 12 March 2019 by Judge Christopher W. Bragg in Union County Superior Court. Heard in the Court of Appeals 21 January 2020.

*The Brough Law Firm, PLLC, by T.C. Morphis, Jr., for plaintiffs-appellants and cross-appellees.*

*Weaver, Bennett & Bland, P.A., by Bo Caudill, Michael David Bland, and Abbey M. Krysak, for defendant-appellee and cross-appellant.*

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DIETZ, Judge.

Plaintiffs Joseph Pollino and Kimberly Vandenberg brought a *quo warranto* action against Defendant Mary Shkut seeking a declaration that Shkut's appointment to the Village of Marvin's village council was unlawful.

The trial court dismissed the action for failure to timely serve the summons and complaint, leading to a long series of procedural battles and, ultimately, this appeal. But, while this appeal was pending, Shkut left the village council. As a result, this appeal is now moot and does not fall within any exception to the mootness doctrine. We therefore dismiss this portion of the appeal as no longer justiciable.

Shkut cross-appealed the denial of a motion for sanctions and that issue is not moot. But, for the reasons explained below, the trial court properly determined that it could not grant the relief Shkut sought. Accordingly, we affirm the order denying Shkut's motion for sanctions.

### Facts and Procedural History

The Village of Marvin is a municipal corporation in Union County and is governed by the Marvin Village Council, which consists of four members and the mayor. During a council meeting in 2018, council member Ron Salimao moved to suspend the procedural rules for council meetings so he could tender his resignation from office and have the council vote to appoint Defendant Mary Shkut as his replacement. Plaintiffs Joseph Pollino, mayor of Marvin, and Kimberly Vandenberg, a council member at the time, objected to Salimao's motion and to Shkut's appointment. Nevertheless, the council, by majority vote, accepted Salimao's resignation and appointed Shkut.

Plaintiffs then filed a *quo warranto* action pursuant to N.C. Gen. Stat. § 1-516 challenging the lawfulness of Shkut's appointment. Several months later, the trial court dismissed Plaintiffs' complaint for failure to timely effect service. Plaintiffs moved to reconsider the dismissal and to alter or amend the judgment under Rule 59 of the North Carolina Rules of Civil Procedure, but the court denied the motion.

Plaintiffs then filed their first appeal to this Court, challenging the dismissal of their complaint. Shkut moved to dismiss that appeal as untimely. That same day, Shkut also filed a motion for sanctions against the law firm representing Plaintiffs.

The trial court granted Shkut's motion to dismiss Plaintiffs' appeal as untimely. The court denied Shkut's motion for sanctions. Both

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Plaintiffs and Shkut then appealed to this Court and filed various procedural motions and petitions.

### Analysis

#### I. Plaintiffs' Appeal - Mootness

[1] While this appeal was pending, Plaintiffs filed a “Notice of Mootness and Motion for Hearing” informing the Court that Shkut’s term of office on the Village Council ended when new council members were sworn in on 18 December 2019. Plaintiffs thus acknowledge that “portions of the appeals” are now moot. We agree.

“Whenever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed” as moot. *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131 (1994).

Here, the only relief Plaintiffs seek in their complaint is a declaration that Shkut’s appointment to the Village Council was unlawful. As Plaintiffs concede in their notice, “[g]iven that [Shkut] no longer holds office and given that neither party has challenged the validity of actions taken by the Council during [Shkut’s] term in office, the portions of the appeals challenging her right to hold office are now moot.”

Nevertheless, Plaintiffs contend that, although otherwise moot, this dispute remains justiciable because it satisfies the “public importance” exception to mootness. Under this exception, we may adjudicate an appeal, despite mootness issues, if it “involves a matter of public interest, is of general importance, and deserves prompt resolution.” *North Carolina State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). But “this is a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest.” *Anderson v. North Carolina State Bd. of Elections*, 248 N.C. App. 1, 13, 788 S.E.2d 179, 188 (2016).

This case does not meet the high standard for application of the public interest exception. First, although one might argue that a lawsuit addressing whether a public official properly holds her office is a matter of significant public importance, that is not what this appeal is about. The trial court dismissed Plaintiffs’ suit for failure to timely serve the summons and complaint. All of the issues raised in this appeal are procedural in nature and address rather mundane aspects of litigation that are not of any particular public importance.

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Plaintiffs contend that resolution of this appeal will aid “future litigants” in understanding the law that applies to “service of the summons and complaint in a *quo warranto* action.” But we see nothing in our jurisprudence on this question that is either so urgent or so important that we must answer this question now. In our view, Plaintiffs seek “to fish in judicial ponds for legal advice.” *Id.* at 13, 788 S.E.2d at 189. We therefore hold that this appeal is not sufficiently exceptional to warrant application of the public interest exception to mootness. Accordingly, we dismiss Plaintiffs’ appeal as moot and no longer justiciable.

**II. Shkut’s Appeal - Motion for Sanctions**

[2] Shkut cross-appealed in this case, arguing that the trial court erred by denying her motion for sanctions against the law firm that represented Plaintiffs in the trial court.

In her motion, Shkut alleged that the law firm representing Plaintiffs impermissibly billed the Village of Marvin for legal services as part of this *quo warranto* suit. Shkut contends that these attorneys’ fees violated a statutory provision governing *quo warranto* suits, N.C. Gen. Stat. § 1-521, which states that “[i]t is unlawful to appropriate any public funds to the payment of counsel fees in any such action.” Shkut argues that the trial court had authority to grant her motion, and to sanction the law firm and its counsel, based on the trial court’s “inherent authority to govern the conduct of attorneys that practice before” the court.

This argument is meritless for several reasons. First, although trial courts have authority to impose sanctions on attorneys in certain circumstances and under certain rules, none of those rules or circumstances are implicated here. *See, e.g.*, N.C. R. Civ. P. 11 and 37(g). Shkut’s motion is, in effect, a request for a declaratory judgment that the Village of Marvin violated N.C. Gen. Stat. § 1-521 by appropriating public funds for counsel fees in a *quo warranto* action, and a corresponding mandatory injunction forcing the law firm to repay the money.

A request for a declaratory judgment that a municipality violated our General Statutes cannot be made in a motion for sanctions against a private party in a separate legal action. *Conner v. North Carolina Council of State*, 365 N.C. 242, 258–59, 716 S.E.2d 836, 846–47 (2011). To obtain this sort of declaratory and injunctive relief, Shkut must bring her own civil action or bring a counterclaim or crossclaim against the proper parties in an appropriate, pending proceeding.

Second, although there are circumstances in which a trial court may discipline counsel for unethical conduct, Shkut did not identify

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any ethical rules that the law firm and its lawyers violated. *See generally Boyce v. North Carolina State Bar*, 258 N.C. App. 567, 575–76, 814 S.E.2d 127, 133 (2018). Indeed, Shkut’s motion for sanctions did *not* seek ethical discipline—it instead requested declaratory and injunctive relief to force a law firm to repay funds to the Village of Marvin. Accordingly, the trial court properly determined that it could not grant Shkut the relief she sought in her unusual motion for sanctions.

**Conclusion**

We dismiss Plaintiffs’ appeal as moot and affirm the trial court’s denial of Shkut’s motion for sanctions.

DISMISSED IN PART; AFFIRMED IN PART.

Judges TYSON and INMAN concur.

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STATE OF NORTH CAROLINA  
v.  
CHARLES BLAGG, DEFENDANT

No. COA18-1117

Filed 5 May 2020

**Drugs—possession with intent to sell and deliver—sufficiency of evidence**

Viewed in the light most favorable to the State, sufficient evidence was presented from which a jury could reasonably infer that defendant possessed methamphetamine with the intent to sell or deliver based on the amount seized from defendant’s car (6.51 grams in a single bag), defendant’s admission that he was on his way to meet another person who had been charged with drug trafficking, and defendant’s possession of drug-related paraphernalia. Although the evidence also could have supported an interpretation that defendant possessed the drugs for personal use, given the totality of the circumstances, the issue was for the jury to resolve.

Chief Judge McGEE dissenting.

Appeal by defendant from judgments entered 29 January 2018 by Judge Gary M. Gavenus in Buncombe County Superior Court. Heard in the Court of Appeals 9 April 2019.

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*Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph E. Herrin, for the State.*

*Vitrano Law Offices, PLLC, by Sean P. Vitrano, for defendant-appellant.*

BERGER, Judge.

Charles Blagg (“Defendant”) was convicted of possession with intent to sell and deliver methamphetamine, possession of methamphetamine, possession of marijuana, and attaining habitual felon status on January 11, 2018. Defendant was sentenced on January 29, 2018, and he received concurrent sentences of 128 to 166 months and 50 to 72 months in prison. Defendant appeals, arguing the trial court erred in denying his motion to dismiss the possession with intent to sell or deliver methamphetamine charge. We disagree.

**Factual and Procedural Background**

Defendant failed to appear when his cases were called for trial, and he was tried *in absentia*. The evidence at trial tended to show that Buncombe County Sheriff’s Office Deputies Darrell Maxwell (“Deputy Maxwell”) and Jake Lambert (“Deputy Lambert”), along with a third deputy, were conducting surveillance of a home on Flint Hill Road in Weaverville on January 4, 2017.

Deputy Maxwell had been with the Sheriff’s Office since 1999. At all relevant times herein, Deputy Maxwell was a member of the Sheriff’s Community Enforcement Team, which specifically addressed drug crimes and service of high-risk warrants. He testified that he was familiar with the appearance, packaging, and distribution of methamphetamine and marijuana.

Deputy Maxwell was positioned across the street from the residence. Deputy Maxwell observed a vehicle pull into the driveway of the residence, and a man went inside “for approximately 10 minutes.” Deputy Maxwell did not see the man re-enter the vehicle, but he saw the lights on the vehicle illuminate and the vehicle pull out of the driveway.

Deputy Maxwell followed the vehicle for approximately one mile. Deputy Maxwell observed the vehicle cross the double yellow line as it approached a blind curve, and he initiated a traffic stop. Defendant was driving the vehicle, and Deputy Maxwell asked Defendant for his driver’s license to conduct a records check. Then, Deputy Maxwell conducted a pat-down search, which Defendant did not object to. Deputy Maxwell

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recovered a pocketknife from Defendant's person but noted there was nothing unusual or uncommon about the discovery. Defendant denied having any drugs or contraband.

Deputy Maxwell asked Defendant for consent to search the vehicle. Defendant responded: "[N]ot without a warrant[.]" Deputy Maxwell returned to his patrol unit "to write [Defendant] a warning ticket for crossing over the double yellow line." While Deputy Maxwell was writing the warning citation, Deputy Lambert arrived with K-9 Officer Jedi.

Deputy Lambert had worked as a law enforcement officer for 13 years at the time of this incident. He had worked with the K-9 Jedi for five years. Jedi was a trained narcotics dog, certified in detecting the odor of marijuana, methamphetamine, cocaine, and heroin. Deputy Lambert, Jedi's trained handler, instructed Jedi to conduct an open-air sniff around Defendant's vehicle. Jedi alerted three times in a manner consistent with detection of an odor of narcotics. Deputy Lambert conducted a partial search of the inside of the vehicle, and he located what appeared to him to be methamphetamine.<sup>1</sup>

Defendant was arrested and a more thorough search of the vehicle was conducted. Deputies discovered an off-white crystalline substance in a large bag and several small bags individually wrapped; several unused syringes; one loaded syringe; a baggie of cotton balls; and a camouflage "safe" that contained plastic baggies and other drug paraphernalia. Deputies did not recover cash from Defendant or from inside the vehicle. No cutting agents, scales, or business ledgers were found. Deputies acknowledged that there was no evidence discovered on this occasion that would indicate that Defendant was a high-level actor in the drug trade. However, Defendant attempted to provide information on an individual wanted for drug trafficking, and he acknowledged that he was going to meet with this individual.

Lab analysis showed that the large bag contained 6.51 grams of methamphetamine. While the total weight of the methamphetamine and the crystalline substance recovered from the vehicle was 8.6 grams, the contents of the remaining baggies containing the crystalline substance were not tested pursuant to crime lab procedures.

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1. We use the terms methamphetamine and "crystalline substance" throughout the opinion. Methamphetamine refers to the substance found in a bag that was analyzed and determined to be 6.51 grams of methamphetamine. "Crystalline substance" refers to the separately packaged, untested quantities of what Deputy Lambert believed to be methamphetamine that was packaged similarly to the 6.51 grams of methamphetamine.



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Defendant was indicted for possession with intent to sell or deliver methamphetamine, possession of methamphetamine, possession of marijuana, possession of marijuana paraphernalia, and attaining habitual felon status. Defendant's case came on for trial on January 9, 2018. The possession of marijuana paraphernalia charge was dismissed at the close of the State's evidence. Defendant also moved to dismiss the possession with intent to sell or deliver methamphetamine charge. He argued that the State did not prove Defendant had the intent to sell or deliver methamphetamine. Defendant specifically argued:

[T]here was no cash, no guns, no evidence of a hand to hand transaction[,] . . . [n]o books, notes, ledgers, money orders, financial records, documents, . . . [and] nothing indicating that [Defendant] is a dealer as opposed to a possessor or user[.]

Defendant appeals the denial of his motion to dismiss.

Standard of Review

"We review the trial court's denial of a motion to dismiss *de novo*." *State v. Blakney*, 233 N.C. App. 516, 518, 756 S.E.2d 844, 846 (2014) (citation omitted).

A motion to dismiss for insufficient evidence is properly denied if there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. All evidence, both competent and incompetent, and any reasonable inferences drawn therefrom, must be considered in the light most favorable to the State. Additionally, circumstantial evidence may be sufficient to withstand a motion to dismiss when a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is the jury's duty to determine if the defendant is actually guilty.

*Id.* 518, 756 S.E.2d at 846 (citation omitted).

"In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). In addition,

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“we have held that in borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury.” *State v. Coley*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 810 S.E.2d 359, 365 (2018) (*purgandum*).

Analysis

“[I]t is unlawful for any person . . . [to] possess with intent to manufacture, sell or deliver, a controlled substance.” N.C. Gen. Stat. § 90-95(a)(1) (2019). “The offense of possession with intent to sell or deliver has three elements: (1) possession; (2) of a controlled substance; with (3) the intent to sell or deliver that controlled substance.” *Blakney*, 233 N.C. App. at 519, 756 S.E.2d at 846.

When direct evidence of a defendant’s intent to sell or deliver contraband is lacking, intent “may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant’s activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia.” *State v. Nettles*, 170 N.C. App. 100, 106, 612 S.E.2d 172, 176 (2005) (citation omitted). Other relevant factors may be considered. *See, e.g., State v. Thompson*, 188 N.C. App. 102, 106, 654 S.E.2d 814, 817 (2008). Because this inquiry is “fact-specific,” courts must consider the “totality of the circumstances in each case . . . unless the quantity of drugs found is so substantial that this factor—by itself—supports an inference of possession with intent to sell or deliver.” *Coley*, \_\_\_ N.C. App. at \_\_\_, 810 S.E.2d at 365.

When viewed in the light most favorable to the State, the evidence as a whole supported an inference that Defendant committed the offense of possession with intent to sell or deliver methamphetamine sufficient to overcome Defendant’s motion to dismiss.

The quantity of a controlled substance alone will only “support the inference of an intent to transfer, sell, or deliver” if it is “substantial”—*i.e.*, more than would reasonably be carried for personal use. *Nettles*, 170 N.C. App. at 105, 612 S.E.2d at 176 (citations and quotation marks omitted). Here, the trial court determined that the State could not argue the 6.51 grams of methamphetamine in Defendant’s possession was not for personal use. However, this does not negate the quantity seized by officers, or the inferences that the jury could reasonably draw therefrom. Defendant possessed at least 6.51 grams of methamphetamine, which is approximately 23% of the quantity necessary to sustain a conviction for trafficking in methamphetamine. This is not a small amount. *See State v. McNeil*, 165 N.C. App. 777, 783, 600 S.E.2d 31, 35 (2004) (finding that 5.5 grams of cocaine, which represents 19.64% of the trafficking amount, along with other relevant circumstances, was sufficient

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for a charge of possession with intent to sell or deliver cocaine); *State v. Brennan*, 247 N.C. App. 399, 786 S.E.2d 433 (2016) (unpublished) (concluding that defendant's possession of 8.75 grams of methamphetamine, which represents 31.25% of the trafficking amount, along with various drug paraphernalia was sufficient evidence of the defendant's intent to sell or deliver methamphetamine).

In addition, the State presented evidence concerning the typical methamphetamine exchange between seller and consumer. Deputy Maxwell testified that, based on his training and experience, the typical transaction for methamphetamine was "anywhere from half a gram to one gram."

There was no evidence that the amount of methamphetamine in Defendant's possession was consistent with personal use. Defendant had more than six times, and up to 13 times, the amount of methamphetamine typically purchased. While it is possible that Defendant had 13 hits of methamphetamine solely for personal use, it is also possible that Defendant possessed that quantity of methamphetamine with the intent to sell or deliver the same. *See Brennan*, 247 N.C. App. 399, 786 S.E.2d 433 (2016) (unpublished) ("[I]f a half gram is considered an average user amount, the 8.75 grams of methamphetamine found in defendant's possession potentially represented 17.5 user amounts."). This issue is properly resolved by the jury.

Moreover, the evidence also tended to show that Defendant had just left a residence that had been under surveillance multiple times for drug-related complaints. Defendant also admitted that he had plans to visit an individual charged with trafficking drugs. While Defendant's actions may be wholly consistent with an individual obtaining drugs for personal use, the jury could also reasonably infer that he had the intent to sell or deliver methamphetamine because of the quantity of drugs, the other circumstantial evidence, and his admission.

In addition, the evidence tended to show that Defendant possessed "paraphernalia or equipment used in drug sales." *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 177 (*purgandum*). Officers seized plastic baggies commonly used for packaging and delivery of controlled substances, cotton balls used to filter liquid methamphetamine, and syringes used to deliver methamphetamine into the body. *See* N.C. Gen. Stat. § 90-113.21(a)(9), (a)(11) (2019). The baggies in Defendant's possession are paraphernalia or equipment used in methamphetamine transactions. The following exchange occurred between the State and Deputy Maxwell concerning packaging:

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Q. Deputy Maxwell, based on your approximately five years of drug investigations while you were on the enforcement team, *these plastic bags, based on your training and experience, is this consistent with your experience as to the dealing and transportation of methamphetamine?*

A. It is.

Q. What are the ways that you typically see methamphetamine packaged?

A. Usually a seller will individually package the substance. Usually in anywhere from half a gram to one gram, depending on what the buyer is wanting. On occasion, they will weigh out and re-package it, and sell whatever the buyer is seeking.

Thus, the evidence presented to the jury tended to show the plastic bags in Defendant's possession were typically used in the transportation and distribution of methamphetamine. Standing alone, possession of the baggies may be innocent behavior. However, when viewed as a whole and in the light most favorable to the State, the jury could reasonably infer that baggies in Defendant's possession were used for the packaging and distribution of methamphetamine.

The question here is not whether evidence that does not exist entitles Defendant to a favorable ruling on his motion to dismiss. That there may be evidence in a typical drug transaction that is non-existent in another case is not dispositive on the issue of intent. Instead, the question is whether the totality of the circumstances, based on the competent and incompetent evidence presented, when viewed in the light most favorable to the State, permits a reasonable inference that Defendant possessed methamphetamine with the intent to sell or deliver.

In this type of case, where reasonable minds can differ, the weight of the evidence is more appropriately decided by a jury. *Coley*, \_\_\_ N.C. App. at \_\_\_, 810 S.E.2d at 365. Accordingly, the trial court did not err in denying the Defendant's motion to dismiss and submitting the case to the jury.

NO ERROR.

Judge TYSON concurs.

Chief Judge McGEE dissents by separate opinion.

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McGEE, Chief Judge, dissenting.

The State had the burden of proving possession of methamphetamine *with the intent to sell or deliver* it (“PWISD”). I believe the record evidence in this case shows nothing more than “the normal or general conduct of people” who *use* methamphetamine; thus, the evidence, at most, “raises only a suspicion . . . that [D]efendant had the necessary intent to sell and deliver” methamphetamine. *State v. Turner*, 168 N.C. App. 152, 158–59, 607 S.E.2d 19, 24 (2005) (citation omitted). I therefore respectfully dissent.

In order to survive a motion to dismiss, the evidence must be substantial—such that “a reasonable inference of defendant’s guilt may be drawn from the circumstances[.]” *State v. Barnes*, 334 N.C. 67, 75–76, 430 S.E.2d 914, 919 (1993). “[V]iew[ing] the evidence in the light most favorable to the State, [and] making all reasonable inferences from the evidence in favor of the State[.]” *State v. Kemmerlin*, 356 N.C. 446, 473, 573 S.E.2d 870, 889 (2002) (citation omitted), the record evidence in this case, as I discuss in detail later in my dissent, was only sufficient to allow a reasonable inference of two relevant facts. First, a single bag containing 6.51 grams of methamphetamine was found in the vehicle (the “vehicle”) Defendant was driving, but the 6.51 grams of methamphetamine was “not sufficient to raise an inference that [possession of] the [drug] was for the purpose of [sale or delivery].”<sup>1</sup> *State v. Wiggins*, 33 N.C. App. 291, 294–95, 235 S.E.2d 265, 268 (1977) (citation omitted). Second, an *undetermined* number of clear plastic bags were found in the lockbox recovered from the rear right floorboard of the vehicle. Due to the lack of record evidence concerning the number of empty plastic bags recovered from the vehicle, or introduced at trial, this Court cannot presume the existence of more than the smallest reasonable number of empty bags—the testimony only indicated plural, or more than one bag. Although the record evidence only indicates that more than one empty bag was recovered—therefore a minimum of two—I will assume, *arguendo*, the record evidence supported a reasonable inference that deputies recovered “a couple” or “a few” empty plastic bags from the vehicle. *State v. Mitchell*, 336 N.C. 22, 28–29, 442 S.E.2d 24, 27–28 (1994), *abrogated on other grounds as noted in State v. Rogers*, 371 N.C. 397, 817 S.E.2d 150 (2018) (emphasis added) (“The trial court found that the

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1. We cannot consider “evidence” that was not admitted at trial and, as the trial court firmly warned the State, the State had not introduced any evidence that 6.51 grams was indicative of an intent to sell, or more than a simple drug user might reasonably possess for solely personal use. The trial court expressly forbade the State from making any inferences to the contrary at trial.

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quantity of marijuana was sufficient to permit the jury reasonably to infer that it weighed more than one and one-half ounces; *but there is nothing in the record before us to support that finding*. The marijuana was not brought forward on appeal, and we have not been able to see it for ourselves.”); *see also Kemmerlin*, 356 N.C. at 473, 573 S.E.2d at 889 (citation omitted) (“We have defined substantial evidence as that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion.”). Based on the facts before us, any inference that more than a “few” empty plastic bags were found in the lockbox “would be based on mere speculation.” *State v. Robbins*, 319 N.C. 465, 487, 356 S.E.2d 279, 292 (1987). I believe the trial court erred in denying Defendant’s motion to dismiss when the record evidence demonstrated nothing more than possession of an amount of methamphetamine consistent with personal use, packaged in a single bag, and a few empty plastic bags recovered from the lockbox, which also contained personal items and paraphernalia only indicating drug use—including a “loaded” syringe.

I. AnalysisA. *Appellate Review*

The majority opinion argues that “[t]he question here is not whether evidence that does not exist entitles Defendant to a favorable ruling on his motion to dismiss. That there may be evidence in a typical drug transaction that is non-existent in another case is not dispositive on the issue of intent.” While the absence of evidence typically found in the possession of drug dealers is not necessarily “dispositive,” decades of precedent establish that, in many cases, the lack of such evidence is dispositive, and I believe that is the case in the matter before us. It is the State’s burden to present substantial evidence supporting Defendant’s intent to sell, and when the State fails to present sufficient evidence of an intent to sell, this Court must remand for entry of an order dismissing that charge:

There was no testimony that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs. Defendant’s actions were not similar to the actions of a drug dealer. . . . A large amount of cash was not found. The police officers found four hundred and eleven dollars on defendant’s person, which defendant stated was part of the money he received from his five hundred and forty-seven dollar social security check. . . . Also, the officers did not discover any other money on the premises. The officers found four to five crack rocks in the

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parked car. Although the officers testified that a safety pin typically is utilized by crack users to clean a crack pipe, there were no other drugs or drug paraphernalia typically used in the sale of drugs found on the premises. *See State v. Rich*, 87 N.C. App. 380, 361 S.E.2d 321 (1987) (indicating an intent to sell or deliver drugs was established where twenty grams of cocaine was found along with a chemical used for diluting cocaine and one hundred small plastic bags in close proximity to the cocaine). Viewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller.

*State v. Nettles*, 170 N.C. App. 100, 107, 612 S.E.2d 172, 176–77 (2005). The *Nettles* Court relied in part on *State v. Turner*, in which this Court reasoned:

The State points to no other evidence or circumstances [than an officer's opinion that the defendant was carrying more crack cocaine than a normal drug user would possess] that in any way suggest that defendant had an intent to sell or deliver the crack cocaine contained in the tube lying on the loveseat between defendant and Ishmar Smith.

The State, for example, presented no evidence of statements by defendant relating to his intent, of any sums of money found on defendant, of any drug transactions at that location or elsewhere, of any paraphernalia or equipment used in drug sales, of any drug packaging indicative of an intent to sell the cocaine, or of any other behavior or circumstances associated with drug transactions. The State's entire case rests only on a deputy's opinion testimony about what people "normally" and "generally" do. The State has cited no authority and we have found none in which such testimony—without any other circumstantial evidence of a defendant's intent—was found sufficient to submit the issue of intent to sell and deliver to the jury.

*State v. Turner*, 168 N.C. App. 152, 158, 607 S.E.2d 19, 24 (2005) (citation omitted). Further:

In *State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265 (1977), defendant was found with less than one-half pound of marijuana in his possession. No weighing scales, rolling papers or other paraphernalia were found. The Court held



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that this small quantity of marijuana alone, without additional evidence, was insufficient to raise the inference that defendant intended to sell the substance.

*State v. King*, 42 N.C. App. 210, 213, 256 S.E.2d 247, 249 (1979); *see also State v. Battle*, 167 N.C. App. 730, 733, 606 S.E.2d 418, 421 (2005) (citation omitted) (“A relatively small drug quantity alone, ‘without some additional evidence, is not sufficient to raise an inference’ ” that the drug was possessed for any reason other than “only for personal use[.]”). As in *Battle*, in this case the State did not introduce evidence that the amount of the drug found in the vehicle was more than an amount “only for personal use[.]” *Id.* In *Battle*:

[T]he State presented little evidence supporting Defendant’s alleged intent to sell cocaine. Only 1.9 grams of compressed powder cocaine—little enough, according to the State’s own chemist, to have been only for personal use—was found. The investigators found no implement with which to cut the cocaine, no scales to weigh cocaine doses, no containers for selling cocaine doses. The investigators further searched Defendant’s car and found neither drugs nor paraphernalia. The State’s meager evidence of intent to sell cannot be considered “substantial evidence” supporting the charge of possession of cocaine with intent to sell.

*Id.* (citation omitted). Because the amount of methamphetamine in this case must be considered relatively minimal—as an amount regularly possessed by simple drug users, the State was required to introduce substantial additional evidence sufficient to allow a reasonable inference that Defendant intended to sell the drug—*i.e.*, items generally associated with drug dealing, testimony about Defendant’s activities suggesting drug selling, and expert testimony making the connection between the evidence presented and drug dealing, when such a connection was outside the common knowledge of a typical juror.<sup>2</sup> The other “items” usually associated with drug dealing rather than drug use are those discussed in *Nettles* and its progeny, such as *large amounts of cash*, mostly in smaller denominations; *scales* to weigh and divide the drug into usual sales amounts; *tools* for “safely” dividing and packaging the drug with minimal loss of product; a *cutting agent* to mix in with

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2. An obvious example of behavior suggestive of drug dealing would be if Defendant was observed in an area known for drug sales activity, remained in the same location for a long period of time, during which Defendant had multiple brief interactions with different people in which Defendant was observed exchanging small packages for cash.



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the drug in order to dilute it and allow the dealer to sell more units; *numerous bags or other containers* to contain the weighed and divided drug, and promote efficient and discreet delivery; *numerous individual units of the drug already packaged in amounts typical for dealing*, and ready to sell. The State would also have to present *expert testimony explaining this evidence* and why it was indicative of drug sales and not just drug use. *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176; *see also Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24; *Battle*, 167 N.C. App. at 733, 606 S.E.2d at 421; *King*, 42 N.C. App. at 213, 256 S.E.2d at 249. I would hold the State failed to meet its burden in this case.

B. *The Lack of Evidence*

In this case, the State's additional evidence consisted of a few empty plastic bags. The State presented no expert, or even lay, testimony linking these empty bags to an intent to sell, rather than use, the methamphetamine. "Viewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller." *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176–77. There was also no testimony that any of Defendant's *actions* after the stop, during the search, or during and after Defendant's arrest, were indicative of an intent to sell the methamphetamine recovered from the vehicle. The State contends in the fact section of its brief that Defendant "voluntarily told [the deputies] during the stop that 'he would give [them] Haywood's most wanted' in reference to 'a female who was wanted for trafficking heroin or something of that nature.'" While this is factually correct, Defendant's statements carry very little relevance, as is indicated by the State's decision not to reference them in the argument section of its brief. Deputy Maxwell testified: Defendant "advised me that he was supposed to meet her. He didn't elaborate on the reason to meet her[.] I can't remember the exact conversation at that point." Deputy Maxwell testified concerning Defendant's claim that he could provide information about an alleged drug dealer that it "was not unusual. I mean it's pretty common once you arrest somebody for possession of some sort of drugs, they want to try to help themselves." Deputy Maxwell had never heard of the woman Defendant was calling "Haywood's most wanted." He did not remember the specifics of Defendant's "offer" to help, and nothing in the record suggests Deputy Maxwell or anyone else thought Defendant's statements warranted any follow-up. Deputy Lambert testified that Defendant "was reaching out trying to figure out how he could assist himself with his bond or his charges that he may incur." There was no testimony that Defendant's attempt to get help "with his bond" "or [the] charges he may incur" in this matter was at all suggestive that Defendant

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was a drug dealer instead of someone “arrest[ed] [] for possession of ... drugs[.]”

Assuming, *arguendo*, that any empty plastic bags were properly introduced into evidence, based upon the record evidence, it was impermissible for either the trial court or the jury to infer that more than “a few” empty plastic bags were recovered, or that possession of *any* number of empty bags constituted evidence from which it could be inferred that Defendant was a drug dealer instead of a simple drug user. There is absolutely no record evidence from which we can infer that the jury, or the trial court, had any idea how many empty bags were found in the vehicle. We cannot assume the existence of facts not supported by the record, nor assume the State met its burden on an issue if *the record* does not support such a determination. *Mitchell*, 336 N.C. at 28-29, 442 S.E.2d at 27-28.

When, as in this case, direct evidence of a defendant’s intent to sell or deliver a controlled substance is lacking, intent “may be inferred from (1) the packaging, labeling, and storage of the controlled substance, (2) the defendant’s activities, (3) the quantity found, and (4) the presence of cash or drug paraphernalia.” *Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176 (citation omitted). Other relevant factors may be considered as well, *see, e.g., State v. Thompson*, 188 N.C. App. 102, 106, 654 S.E.2d 814, 817 (2008), but “in ruling upon the sufficiency of evidence in cases involving the charge of possession with intent to sell or deliver, our courts have placed particular emphasis on *the amount* of drugs discovered, their *method of packaging*, and the presence of paraphernalia *typically used to package drugs for sale*.” *State v. Coley*, 257 N.C. App. 780, 788, 810 S.E.2d 359, 365 (2018) (emphasis added); *see also Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176; *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24; *Battle*, 167 N.C. App. at 733, 606 S.E.2d at 421; *King*, 42 N.C. App. at 213, 256 S.E.2d at 249.

The only testimony concerning packaging of the drug was the following testimony by Deputy Maxwell given immediately after he had testified about the photographs entered into evidence showing the plastic bags with unknown substance(s) on the scale:

Q. Deputy Maxwell, based on your approximately five years of drug investigations while you were on the enforcement team, these plastic bags, based on your training and experience, is this consistent with your experience as to the dealing ... of methamphetamine?

A. It is.

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Q. What are the ways that you typically see methamphetamine packaged?

A. Usually a seller will individually package the substance. Usually in anywhere from half a gram to one gram, depending on what the buyer is wanting. On occasion, they will weigh out and re-package it, and sell whatever the buyer is seeking.

First, Deputy Maxwell's opinion testimony that the "plastic bags" he had just seen in photographs—the three plastic bags containing crystalline substance(s) being weighed—were "consistent with ... the dealing ... of methamphetamine[,] " was based on the improper assumption that all three bags contained methamphetamine. This constituted "only [on] a deputy's opinion testimony about what people 'normally' and 'generally' do"—the kind of testimony found insufficient, standing alone, "to submit the issue of intent to sell and deliver to the jury." *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24 (citation omitted). Second, the methamphetamine in this case was *packaged* in a single bag, in a quantity at least six times more than the one-half-ounce to one-ounce amounts Deputy Maxwell testified were standard amounts of methamphetamine when packaged for sale; the deputies recovered *no* one-half to one gram amounts of methamphetamine—packaged in a manner facilitating concealment and quick sale—whether in small plastic bags or any other type of container. According to the *record* evidence, the methamphetamine in this case was not packaged in a manner normally associated with an intent to sell the drug. *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176 ("There was no testimony that the drugs were packaged, stored, or labeled in a manner consistent with the sale of drugs.").

"Defendant's actions were not similar to the actions of a drug dealer." *Id.* at 107, 612 S.E.2d at 176. Deputy Maxwell testified that he did not observe Defendant doing anything out of the ordinary prior to stopping him—no hand-to-hand transactions with another person, for example. "I did not witness any transaction." In fact, Defendant was not observed interacting with anyone. The only reason Deputy Maxwell's suspicions were raised is because the residence was under surveillance, Defendant drove there and spent approximately ten minutes inside, then drove away.<sup>3</sup> Deputy Maxwell testified he had never seen Defendant or his vehicle visit this residence before, and no evidence was produced

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3. There is no *record* evidence that the residence was under surveillance due to suspected illegal drug activity. The trial court sustained Defendant's objection to Deputy Maxwell's testimony that he was watching the residence due to "complaints" concerning "suspected drug activity[.]" and there was no other testimony in evidence to that effect.

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that anyone who lived in the residence, or anyone other than Defendant who had visited the residence, was *ever* involved in drug sales; but, most relevantly, prior to Defendant's arrest. As noted above, the *amount* of the drug in this case *must* be treated as an amount consistent with personal use, because, as the trial court clearly ruled, the State offered no evidence that would allow the jury to infer otherwise. *Id.* at 106, 612 S.E.2d at 176 ("it cannot be inferred that defendant had an intent to sell or distribute from such a[n] . . . amount alone").

*No cash* was found on Defendant or in the vehicle. *See id.* at 107, 612 S.E.2d at 176-77 (Evidence was insufficient where: "A large amount of cash was not found. The police officers found four hundred and eleven dollars on defendant's person, which defendant stated was part of the money he received from his five hundred and forty-seven dollar social security check." "Also, the officers did not discover any other money on the premises."); *see also Wilkins*, 208 N.C. App. at 732, 703 S.E.2d at 810 (citation omitted) (the Court considered "the fact that defendant was carrying \$1,264.00 in cash" in denominations of between \$1.00 and \$20.00 bills, but determined this evidence, considered with the State's other evidence, was not sufficient to support an intent to sell or deliver). Deputy Maxwell agreed, "based on [his] training and experience," that "drug dealers maintain on hand large amounts of U.S. currency" "so that they can maintain and finance their operation[.]" When asked to confirm that he "found zero money on" Defendant, Deputy Maxwell testified "I did not confiscate any currency from [Defendant]." Deputy Maxwell testified it was "common" for drug dealers to keep "ledgers" that "[u]sually [contain] names—and maybe not full names, but names, maybe money owed or—that's been my experience." He also testified "that drug dealers often maintain books . . . about their drug dealing[.]" However, no such books or ledgers were found in the vehicle.

Deputy Maxwell testified that methamphetamine is often packaged in plastic bags for sale—therefore plastic bags can be considered *paraphernalia* depending on the facts introduced at trial. In this case, although the State appears to believe it introduced testimony that possession of empty plastic bags was an indication of an intent to sell, there is *no* testimony to that effect in the record. Nor was there any testimony that it was unusual to find a few empty plastic bags—or a large number of empty plastic bags—in the vehicle of a simple drug user. Further, there was absolutely no evidence at trial that any of the other paraphernalia found in the vehicle—an unknown number of commonly available syringes in the original small, unopened store packaging; one "loaded" syringe; cotton balls; and one rubber band—was indicative of an intent to sell methamphetamine. This is likely because these items suggest

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methamphetamine use, not an intent to sell the drug. Without appropriate testimony concerning these paraphernalia items, there was no evidence from which an intent to sell, rather than use, could be properly inferred from their presence in the vehicle. *Id.* at 107, 612 S.E.2d at 177 (citation omitted) (there was no “drug paraphernalia typically used in the sale of drugs found [on the defendant or] on the premises”).

There was no evidence of other behaviors or items normally associated with drug sales. There was no *diluting or “cutting” agent* found, *id.*; Deputy Maxwell testified: “Drug dealers use [cutting agents] so when they get product, they can minimize it with rock salt and sell more”; and no *scales* to weigh and divide the drug into *usual* sales amounts were found, *King*, 42 N.C. App. at 213, 256 S.E.2d at 249. Deputy Maxwell testified that “in [his] training and experience, most drug dealers, they have scales so they know what they’re selling;” and scales are “very important for a drug dealer so they don’t get ripped off” but “[t]here were no scales in th[e] vehicle.” There was no testimony that Defendant had *tools* for “safely” dividing and packaging the drug with minimal loss, *Battle*, 167 N.C. App. at 733, 606 S.E.2d at 421; that he had *numerous* bags or other containers to contain the weighed and divided drug and promote efficient and discreet delivery, *Nettles*, 170 N.C. App. at 106, 612 S.E.2d at 176; nor that he possessed *numerous individual units* of the drug already packaged in amounts typical for dealing, and ready to sell.

There was testimony that drug dealers often have *multiple cell phones* on which they conduct their business. A single cell phone was recovered from Defendant, taken into evidence, and forensically examined. No evidence supporting Defendant’s involvement in the sale of drugs was recovered from Defendant’s single cell phone. The State would also have to present *expert testimony explaining this evidence* and why it was indicative of drug sales and not just drug use. *Mitchell*, 336 N.C. at 29, 442 S.E.2d at 28 (“The jury may not find the existence of a fact based solely on its in-court observations where the jury does not possess the requisite knowledge or expertise necessary to infer the fact from the evidence as reflected in the record.”); *Nettles*, 170 N.C. App. at 108, 612 S.E.2d at 177 (“the police officer did not testify that defendant possessed an amount that was more than a drug user normally would possess for personal use”); *Turner*, 168 N.C. App. at 158, 607 S.E.2d at 24 (“The State’s entire case rests only on a deputy’s opinion testimony about what people “normally” and “generally” do. The State has cited no authority and we have found none in which such testimony—without any other circumstantial evidence of a defendant’s intent—was found sufficient to submit the issue of intent to sell and deliver to the jury.”).

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C. *The State's Arguments*

## 1. Arguments on Appeal

“When the evidence is . . . sufficient only to raise a suspicion or conjecture as to . . . the commission of the offense . . . , the motion to dismiss must be allowed.’ ” *Id.* I assume, *arguendo*, the State is correct that Defendant possessed a few empty plastic bags “which can be used in order to divide drugs into smaller quantities for sale.” However, the State is incorrect in its assertion that the record evidence shows that the empty bags were “numerous.” The State introduced the plastic bags into evidence only generally—as part of the contents of the lockbox. There was no testimony concerning the number of empty bags, the size of the empty bags, a description of the empty bags, any potential relevance of the empty bags or, more specifically, how the presence of empty bags constituted evidence of methamphetamine dealing rather than use.

The remainder of the State’s arguments are also either based on evidence not introduced at trial, or are not supported by any law, and should be summarily dismissed. No evidence supports the State’s characterization of “[t]he amount of the drugs” recovered as “substantial[.]” There was no testimony that 6.51 grams of methamphetamine was a “substantial” amount, and the jury was not permitted to make that determination without expert testimony to that effect. There was no testimony comparing the 6.51 ounces of methamphetamine recovered to the amount required for a trafficking charge, 28 grams, nor any testimony explaining the relevance of any such comparison. The trial court properly prohibited the State from characterizing 6.51 grams of the drug as more than was consistent with personal use.

When determining whether an element exists, the jury may rely on its common sense and the knowledge it has acquired through everyday experiences. Thus, the jury may, based on its observations of the defendant, assess whether the defendant is older than twelve. The jury’s ability to determine the existence of a fact in issue based on its in-court observations, however, is not without limitation. The jury may not find the existence of a fact based solely on its in-court observations where the jury does not possess the requisite knowledge or expertise necessary to infer the fact from the evidence as reflected in the record.

*Mitchell*, 336 N.C. at 29, 442 S.E.2d at 28. The average juror does not have any personal familiarity with methamphetamine, its packaging,

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the usual tools used to portion and package methamphetamine, or what amount of the drug would constitute a “substantial” amount. *Id.* at 30, 442 S.E.2d at 28 (“Unlike age, the weight of a given quantity of marijuana is not a matter of general knowledge and experience. .... Human characteristics associated with various ages are matters of common knowledge. The same cannot be said regarding the weight of various quantities of marijuana. This is a matter familiar only to those who regularly use or deal in the substance, who are engaged in enforcing the laws against it, or who have developed an acute ability to assess the weight of objects down to the ounce. The average juror does not fall into any of these categories.”).

The State also makes an incorrect statement of fact and law where it asserts: “Defendant was in possession of a controlled substance, that was visually identified by law enforcement as methamphetamine. This was confirmed as methamphetamine by the testimony of [ ] Cha[ ]ncey[,] who performed scientific testing on the substances presented and confirmed that the substances were methamphetamine, as testified to by Detective Maxwell.” As the trial court properly understood, a law enforcement officer’s visual inspection of a crystalline substance *is not sufficient* to identify that substance as methamphetamine. “The North Carolina Supreme Court held in *Ward* that ‘[u]nless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.’ ” *State v. Carter*, 255 N.C. App. 104, 106–07, 803 S.E.2d 464, 466 (2017) (citations omitted). For this reason, whenever the State’s case included either deputy’s opinion that the crystalline substance(s) were methamphetamine, the trial court instructed the jury to discount that testimony, and not consider it in any manner during their deliberations.

Further, Chancey did not perform “scientific testing on the substances” and “confirm[] that the substances were methamphetamine, as testified to by Deputy Maxwell.” Only one bag, and thus only one “substance,” was tested. Chancey did not *confirm* the deputies’ opinions, which were not evidence, she conducted testing on a single bag containing a crystalline substance and determined, scientifically, that the single bag contained 6.51 grams of methamphetamine—with a trace amount of an unidentified substance. The additional crystalline substance(s) contained in the plastic bags recovered from the vehicle were never tested, and the trial court clearly instructed the State and the jury that no inferences concerning the contents of the additional substance-containing bags could be made: “Three of those bags there is no evidence that they are methamphetamine. You understand that?” Further, the State



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incorrectly argues that Chancey “did not test the other items presented as the weight of [the bag containing 6.51 grams of methamphetamine] in and of itself met the statutory weight requirements for the charges presented.” This statement is erroneous because there is no “statutory weight requirement” for the charge of PWISD. Therefore, there could not have been a decision by the trial court or the jury that 6.51 grams met any “statutory requirement.”

The State further argues, “[m]ore importantly the other items found within [] Defendant’s vehicle infer the intent to sell[.]” The State only mentions two “other items”: “[N]umerous syringes which can be used to deliver drugs in the system of a purchaser. More importantly, there were numerous baggies, which can be used in order to divide drugs into smaller quantities for sale.” As noted, the syringes could not serve as evidence of Defendant’s intent to sell because there was no testimony or other evidence introduced at trial allowing such an inference. There is no evidence concerning the number of syringes found in the vehicle, so there is nothing from which one could determine the presence of “numerous” syringes. The State’s argument on appeal does not demonstrate more than that Defendant was in possession of an amount of methamphetamine small enough “to have been only for personal use[.]” *Battle*, 167 N.C. App. at 733, 606 S.E.2d at 421, and a few empty plastic bags, the significance of which was not established at trial. *Mitchell*, 336 N.C. at 29, 442 S.E.2d at 28.

## 2. Arguments at Trial

The State’s arguments at trial, made *after* the close of all the evidence, also mainly focused on the empty bags. As noted above, the only testimony concerning packaging of the drug was the opinion testimony of Deputy Maxwell, which only undercut the State’s case by introducing evidence that the usual packaging of methamphetamine for sale was in separate one-half-ounce to one-ounce amounts—not a single bag containing 6.51 ounces. Further, no empty plastic bags had been introduced into evidence at this time, so Deputy Maxwell’s testimony was limited to the several plastic bags containing crystalline substance(s) that were depicted in the photographs he had just been shown.

Deputy Maxwell’s answer was sufficient to permit an inference that methamphetamine packaged for sale is “usually” “individually package[d]” “in anywhere from half a gram to one gram, depending on what the buyer is wanting.” In this case, the deputies recovered a single bag containing 6.51 grams of methamphetamine—*i.e.*, an amount and method of packaging methamphetamine that was not, according to the testimony, “usual,” if the intent was to sell. Deputy Maxwell also



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testified there was a second, not “usual” packaging method, stating: “On occasion, they will weigh out and re-package it, and sell whatever the buyer is seeking.” Taken together, this testimony is some evidence that occasionally methamphetamine dealers carry larger quantities of the drug in a single container and re-package it for sale only after the buyer specifies an amount, but the “usual” method is to prepackage one-half gram to one gram amounts and carry those for sale. Therefore, the single bag containing 6.51 grams of methamphetamine was not packaged the way a dealer would “usually” package the drug for sale, and the lack of common tools for dividing, weighing, and repackaging for sale suggests use, not dealing. The bags containing untested substance(s) could not be considered by the trial court or the jury as evidence of the *Nettles* factor of “*packaging*.”<sup>4</sup>

There was no testimony that the “few” empty plastic bags found in the lockbox with the “loaded” syringe, used “blunts,” Chapstick, a personal letter, a single rubber band, and cotton balls, were at all suggestive of an intent to sell any of the methamphetamine—which was recovered from the console. There was no testimony that it was uncommon for a drug user to have a “few” empty bags in his vehicle for personal use, whether related to methamphetamine or anything else.

The syringes *cannot* constitute evidence in this case supporting an intent to sell because there was no testimony, expert or otherwise, that could have possibly linked the syringes to any intent to sell. Neither the trial court nor the jury could infer such a connection without expert testimony because whether or not drug dealers also typically possess “loaded” or new syringes is not a fact of common knowledge. *Mitchell*, 336 N.C. at 29, 442 S.E.2d at 28 (“The jury may not find the existence of a fact based solely on its in-court observations where the jury does not possess the requisite knowledge or expertise necessary to infer the fact from the evidence as reflected in the record.”). To a lay person, an unknown but small number of syringes would be at least as likely, if not more likely, to indicate drug *use* than an intent to sell. “Viewed in the light most favorable to the State, the evidence tends to indicate defendant was a drug user, not a drug seller.” *Nettles*, 170 N.C. App. at 107, 612 S.E.2d at 176–77. As noted above, the forensic examination of Defendant’s single cell phone turned up no evidence that Defendant was

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4. The State asserts in its brief that “Chauncey [sic] ... performed scientific testing on the substances ... and confirmed that the substances were methamphetamine, as testified to by Detective [sic] Maxwell.” This is simply incorrect. A single substance was tested from a single bag. As the trial court told the State: “Three of those bags there is no evidence that they are methamphetamine. You understand that?”

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involved in the sale of methamphetamine or any other drug. Other than the “few” plastic bags, there was *no* paraphernalia found that was even arguably indicative of an intent to sell the methamphetamine.

In response to this lack of evidence, Defendant argued the PWISD charge should be dismissed because “there was no cash, no guns, no evidence of a hand to hand transaction. No evidence of people. No books, notes, ledgers, money orders, financial records, documents, guns. Nothing indicating that [Defendant] is a dealer as opposed to a possessor or user[.]” “They have to do something other than just say, hey, you had this. There has to be some testimony about something else, and we don’t have any of that. No evidence of confederates, no evidence of conspiracy, no evidence of—again, a sale, hand to hand transaction. Nothing else in the car. Nothing.”

Contrary to the State’s argument to the trial court, there was no record evidence of the number of empty bags because the State did not have Detective Maxwell count any empty plastic bags during his testimony; instead, the State counted the bags itself while the jury was in the jury room awaiting closing arguments. If the trial court considered any of this non-evidence, it would constitute error.

The majority opinion generally appears to consider the empty plastic bags as the most important factor in support of the trial court’s denial of Defendant’s motion to dismiss, but it also discusses additional issues or alleged facts that it seems to find relevant. The majority notes that Deputy Maxwell “estimated that this was the fifth time he had participated in a stake out of [the] residence[.]” and surmises “the evidence ... tend[s] to show that Defendant had just left a residence that had been under surveillance multiple times for drug-related complaints.” As noted, the trial court sustained Defendant’s objection to Deputy Maxwell’s testimony that he was watching the residence due to “complaints” concerning “suspected drug activity”; there was no evidence presented at trial that the “residence” was “under surveillance multiple times for drug-related complaints.” Deputy Maxwell also testified that he had never seen Defendant or the car Defendant was driving at the residence prior to the evening of 4 January 2017.

The majority opinion also states that “Deputy Lambert conducted a partial search of the inside of the vehicle, and he located what appeared to him to be methamphetamine.” It further states that the untested “[c]rystalline substance” recovered from the vehicle and packaged separately from the tested bag containing 6.51 grams of methamphetamine was “what Deputy Lambert believed to be methamphetamine.” Deputy Lambert did not testify at trial that the crystalline substance “appeared

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to be methamphetamine” but testified that he located “the black container that had the white crystal substance in it.” While on the scene, Deputy Lambert did tell Deputy Maxwell that he had found what he believed to be methamphetamine in the vehicle, and this statement was captured by both deputies’ body cams. When this comment came up on the body cam footage, the trial court requested the video be paused and instructed the jury: “Now Ladies and Gentlemen, you will disregard that statement that it appears to be methamphetamine. You will not consider that for any purpose in this trial. Each of you understand that?” There was no evidence admitted at trial that either deputy believed any of the crystalline substance(s) were methamphetamine, and the fact that Deputy Lambert made such a statement to Deputy Maxwell during the course of the search of the vehicle is irrelevant to our review. The *only* evidence establishing the presence of methamphetamine in the vehicle was the testimony of Chancey, who testified that a single plastic bag recovered from the vehicle contained 6.51 grams of methamphetamine.

There is no record evidence of the “total weight” of the methamphetamine combined with the other crystalline substance(s) recovered from the vehicle. Although Chancey testified that she determined the “gross” weight of the non-tested substance(s), she did not provide those numbers at trial. The trial court cautioned the State that it could not use the untested bags as evidence of “the quantity of the substance [*i.e.* the methamphetamine].”

Any inference that the untested crystalline substance(s) were also methamphetamine, or any guess as to the weight of those substance(s), would not be based upon any evidence admitted at trial and, therefore, would be improper. On direct examination Deputy Maxwell testified concerning one of the State’s exhibits: “That is a large bag of white crystal substance, what I believed to be methamphetamine.” Defendant objected, and the trial court responded: “Sustained as to what he believes it to be. Ladies and Gentlemen, you’ll disregard that. You will not consider it for any purpose in this trial.” The trial court cautioned the State at trial: “What you’re asking [the jury] to do is find [the untested substances in the other plastic bags are also] methamphetamine. The State cannot do it under the evidence in this case. Now if you want me to give an instruction to this jury that this Court instructs this jury that based upon the evidence they *cannot* find the items in [the additional bags] are methamphetamine, then I’ll do that[.] But *they can’t make that finding. There’s no evidence.*” (Emphasis added). The trial court later stated: “I’m going to instruct the State that they are not to tell this jury that the jury can look at those four packages and make a determination by the

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jury that the other three that were not tested are—is methamphetamine.”<sup>5</sup> The untested substance(s) are not relevant.

No evidence was introduced that 6.51 grams of methamphetamine “is not a small amount[,]” and without testimony to that effect, it would have been an improper inference for the trial court or the jury to draw in this case. We are limited to the evidence of record, which is that Defendant possessed *exactly* 6.51 grams of methamphetamine. As the trial court noted, the State only presented evidence of 6.51 grams of methamphetamine recovered from the vehicle. We cannot infer the possibility that there was more than 6.51 grams of methamphetamine recovered when there is no record evidence that would allow such an assumption. The trial court cautioned the State it could not argue 6.51 grams of methamphetamine *was an amount greater than one would normally carry for personal use*. “Neither will you[, the State,] be able to argue to this jury that [the 6.51 grams] was more than [an amount normally carried for] personal use, *because there’s no evidence of that*.” (Emphasis added). See *Nettles*, 170 N.C. App. at 108, 612 S.E.2d at 177 (“[T]he police officer did not testify that defendant possessed an amount that was more than a drug user normally would possess for personal use.”). In other words, the State could not argue the weight of the methamphetamine as a factor indicating Defendant had the intent to sell or deliver the drugs instead of the intent to consume all 6.51 grams himself. This meant the 6.51 grams of methamphetamine was sufficient to support the possession charge, but the State would have to rely almost entirely on *additional* evidence to meet its burden of proving the element of Defendant’s intent to sell or deliver for the PWISD charge.

“Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required.” *Ward*, 364 N.C. at 147, 694 S.E.2d at 747. “[T]he expert witness testimony required to establish that the substances introduced here are in fact controlled substances must be based on a scientifically valid chemical analysis and not mere visual inspection.” *Id.* at 142, 694 S.E.2d at 744.

There was no testimony concerning the amount of methamphetamine drug users typically “purchase.” There was no evidence from

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5. It is not clear what the “fourth” package is in reference to. Only three bags containing crystalline substance(s) were introduced by Deputy Maxwell through the photographs contained in the record. However, a fourth bag of untested substance would add nothing to the State’s case.

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which it could be inferred that a drug user was unlikely to possess 6.51 grams of methamphetamine for personal use. There was no testimony concerning the amounts of methamphetamine generally purchased for personal use, so any attempt to make that determination is speculation. I do agree with the general concept that “[w]hile it is possible that [someone could possess 6.51 grams of] methamphetamine solely for personal use, it is also possible that [person] possessed that quantity of methamphetamine with the intent to sell or deliver the same.” Both of these things are possible and deciding which one is correct requires speculation. *Robbins*, 319 N.C. at 487, 356 S.E.2d at 292. It is possible that a defendant in possession of any amount of methamphetamine, no matter how small, intends to sell it—that is why the law in this case required the State to prove sufficient evidence beyond mere possession to prove PWISD. Further, because there was no expert testimony attempting to estimate the number of “hits” 6.51 grams might constitute, or how many “hits” would be considered excessive for personal use, any determination of the number of “hits” by the trial court or jury would have been improper. Nor should this Court make this kind of fact-finding determinations on appeal when there was no expert testimony to support this determination at trial. Unlike in *Nettles*, there was no testimony as to the amount of methamphetamine normally consumed in a single dose, nor the monetary value of 6.51 grams of methamphetamine. Deputy Maxwell simply testified that generally “a seller will individually package the substance. Usually in anywhere from half a gram to one gram, depending on what the buyer is wanting.”

*State v. Brennan*, cited by the majority opinion, is unpublished and I do not believe this Court should adopt its reasoning that *evidence not presented at trial* may be considered by this Court and used to affirm the trial court’s denial of a motion to dismiss. See *State v. Brennan*, 247 N.C. App. 399, 786 S.E.2d 433, 2016 WL 1745101, \*4 (2016) (“Detective Phillips testified that in Haywood County, methamphetamine is usually priced and sold in half grams at \$50 and whole grams at \$100. Thus, if a half gram is considered an average user amount, the 8.75 grams of methamphetamine found in defendant’s possession potentially represented 17.5 user amounts.”). In addition, there was substantially more incriminating evidence introduced at trial in *Brennan* than in this case. *Id.* at \*3.

The majority opinion contends that Defendant possessed “paraphernalia” indicative of an intent to sell the methamphetamine in addition to the empty plastic bags, namely cotton balls and syringes. The majority opinion does not indicate how the cotton balls or syringes are indicative of an intent to sell and not simply the necessary tools of a user

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whose method of ingesting methamphetamine is injection, and there was no record evidence to support any alternate inference. At trial, the State argued *State v. Carter*, 254 N.C. App. 611, 802 S.E.2d 917, 2017 WL 3027550 (2017) (unpublished). *Carter* hurts the State's case, as in *Carter* this Court held that "paraphernalia" is relevant to prove PWISD methamphetamine when it is "consistent with an intent to sell methamphetamine such as weighing scales, chemicals, or empty plastic baggies." *Id.* at \*3 (citation omitted). This Court determined: "[T]he syringe found on [the d]efendant, like the safety pin in *Nettles*, indicates [the d]efendant possessed the methamphetamine for personal use" and not with an intent to sell. *Id.* (citation omitted). In this case, the cotton balls are certainly no more indicative of an intent to sell than the syringes. There was no expert or other testimony that cotton balls and syringes are commonly associated with drug dealers, so we cannot consider them as such in our *de novo* review. However, Deputy Maxwell testified that these items *are* used to prepare and inject methamphetamine by drug users, therefore, this Court, the trial court, and the jury could rely on their common sense to conclude these items are necessary for drug users to inject methamphetamine, and would naturally be found in the possession of drug *users*.

Further, Chancey testified that she only obtained the "gross" weights of the bags that were not tested,<sup>6</sup> but that she *would have* obtained exact weights, and tested each of the bags, if there had been enough of the crystalline substance(s) for the State to bring a trafficking charge against Defendant; explaining that because the total weight of the crystalline substance(s) wasn't close to the amount required for trafficking, "*the charge would be the same regardless of how many items I tested[.]*" (Emphasis added). The majority opinion mentions that the State did not test the additional crystalline substance(s) because it was the State "crime lab procedure[]" not to do so in cases like this one. This "procedure" is not justified because, although the amount of crystalline substance recovered from Defendant's vehicle was substantially less than the 28 grams required for a trafficking charge, Defendant was not only charged with the Class I felony of possession, he was *also charged with the Class H felony of PWISD*, and one of the factors considered for proof of the *essential element* of intent to sell is *the amount of the controlled substance* involved. If the State wanted to use the total

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6. "I weighed with the packaging, so I gave a gross weight, but I did not get a net weight of the substance itself." Further, not even the gross weight of the additional bags is included in Chancey's report.

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amount of the crystalline substance recovered against Defendant it could, and should, have tested it.<sup>7</sup>

PWISD might not carry sentences as severe as trafficking, but a conviction for PWISD carries a substantially greater punishment than a conviction for possession—even felony possession. In this case, based upon Defendant’s prior record level and his habitual felon status, Defendant was sentenced to fifty to seventy-two months for his possession of methamphetamine conviction. For the PWISD conviction, Defendant was sentenced to 128 to 166 months imprisonment. The difference between the maximum ranges of Defendant’s possession and PWISD convictions is ninety-four months, or 7.82 years. Defendant’s conviction is based on speculation as to whether someone possessing an amount of methamphetamine consistent with personal use, who was also in possession of a few empty plastic bags, had the intent to sell any of that methamphetamine. There was no way to make that determination without simply guessing or relying on impermissible inferences from the trial and from the State’s arguments, which are not evidence. It simply was not possible for the State to meet its burden of proof based upon the record evidence, and I would hold “that [D]efendant’s conviction be reversed for [PWISD] and remanded for resentencing, on the lesser included ... offense of possession[.]” *Nettles*, 170 N.C. App. at 108, 612 S.E.2d at 177 (citation omitted). Otherwise, Defendant could be imprisoned an additional 7.82 years because a few empty plastic bags were found in the vehicle along with an amount of methamphetamine consistent with personal use.

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7. Because Defendant did not move to suppress the untested crystalline substance(s), or object to its introduction at trial, it was in evidence. However, even if the bags in which the untested substance(s) were contained had some minimal relevance, the untested substance(s) itself had none.



**STATE v. BURGESS**

[271 N.C. App. 302 (2020)]

STATE OF NORTH CAROLINA

v.

BRADLEY W. BURGESS

No. COA19-685

Filed 5 May 2020

**1. Witnesses—competency to testify—impairment—motion to disqualify**

In a trial for drug offenses where the presiding judge suspected that a witness for the State was impaired during his testimony and the witness testified positive for amphetamines and methamphetamine after he left the stand, the trial court did not abuse its discretion in denying defendant's motions to disqualify the witness under Rule of Evidence 601(b) and to strike his testimony because the judge had ample opportunity to observe the witness, the witness was able to recall dates and events, other evidence presented entirely corroborated the witness's testimony, and evidence of the positive drug test was presented to the jury for impeachment purposes.

**2. Criminal Law—mistrial—impaired witness**

In a trial involving drug offenses where a witness for the State was under the influence of drugs when he testified, the trial court did not abuse its discretion in denying defendant's motion for a mistrial because the other evidence corroborated the witness's testimony, the court found the witness to be competent to testify, and the jury was informed of the witness's impairment so it could consider the credibility and weight to give to his testimony.

Appeal by defendant from judgment entered on or about 13 February 2019 by Judge Charles H. Henry in Superior Court, Onslow County. Heard in the Court of Appeals 4 February 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Thomas J. Campbell, for the State.*

*James R. Parish for defendant-appellant.*

STROUD, Judge.

Defendant appeals a judgment convicting him of three drug-related charges. Although the witness who participated in a controlled buy was



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impaired by controlled substances during his testimony, the trial court conducted a proper investigation of his impairment, informed counsel, and gave counsel full opportunity to request remedial actions. The trial court did not abuse its discretion in determining a mistrial was not necessary to ensure a fair trial for defendant and that the witness was competent to testify, despite his impairment, where the witness was capable of expressing himself concerning the matter at issue and other evidence corroborated the veracity of his statements. We conclude there was no error.

**I. Background**

The State's evidence tended to show that on 18 April 2017, the Onslow County Sheriff's Department set up a controlled buy between Mr. Asay and defendant in which defendant ultimately sold Mr. Asay a controlled substance, methamphetamine. Defendant was tried by a jury. During the State's case in chief, Detective Michael Noel testified as to the controlled buy. The actual controlled buy took place in a vehicle and Detective Noel testified to the circumstances of the buy, including searching Mr. Asay before he went to the vehicle for the buy and giving him money with which to purchase drugs. Detective Noel further testified he never lost sight of Mr. Asay, and when he returned from defendant he had controlled substances with him though he did not have them when he walked over to the vehicle.

Mr. Asay also testified about the drug purchase from defendant, but after Mr. Asay had given his testimony, the trial court raised a concern that he appeared to be under the influence of a controlled substance or alcohol. On the trial court's order, Mr. Asay was drug-tested by his probation officer and was positive for use of amphetamines and methamphetamine. Defendant moved for a mistrial and thereafter to disqualify Mr. Asay as a witness under Rule of Evidence 601(b) and strike his testimony because he was an incompetent witness, but the trial court denied both motions.

The jury ultimately convicted defendant of delivering methamphetamine; possession of drug paraphernalia; and possession with intent to sell and deliver methamphetamine. The trial court entered judgment. Defendant appeals.

**II. Mr. Asay's Testimony**

Defendant makes two arguments on appeal. Both arguments are based upon Mr. Asay's competency to testify while impaired.

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[271 N.C. App. 302 (2020)]

## A. Rule of Evidence 601(b)

**[1]** Defendant argues the trial court should have allowed his motion to exclude and strike Mr. Asay's testimony based on Rule of Evidence 601(b) because Mr. Asay was an incompetent witness, and thus he could not receive a fair trial. "The competency of a witness is a matter which rests in the sound discretion of the trial judge. Absent a showing that the ruling as to competency could not have been the result of a reasoned decision, the ruling must stand on appeal." *State v. Ford*, 136 N.C. App. 634, 639, 525 S.E.2d 218, 221-22 (2000) (citations and quotation marks omitted).

The competency of a witness to testify is governed by North Carolina General Statute § 8C-1, Rule 601, which provides in pertinent part:

(a) General rule.—Every person is competent to be a witness except as otherwise provided in these rules.

(b) Disqualification of witness in general.—A person is disqualified to testify as a witness when the court determines that the person is (1) incapable of expressing himself or herself concerning the matter as to be understood, either directly or through interpretation by one who can understand him or her, or (2) incapable of understanding the duty of a witness to tell the truth.

N.C. Gen. Stat. § 8C-1, Rule 601 (2019).

This Court has previously noted that drug use alone will not make a witness incompetent to testify. *See State v. Edwards*, 37 N.C. App. 47, 49, 245 S.E.2d 527, 528 (1978). If the witness is able to express himself well enough to be understood and is able to understand the obligation to testify truthfully, impairment by drugs does not render him incompetent, although he may be impeached with evidence of his impairment:

[D]rug use does not per se render a witness incompetent to testify. Generally, evidence that the witness was using drugs, either when testifying or when the events to which he testified occurred, is properly admitted only for purposes of impeachment and only to the extent that such drug use may affect the ability of the witness to accurately observe or describe details of the events which he has seen.

*Id.* Here, defendant has not demonstrated that Mr. Asay was incapable of expressing himself or incapable of understanding his duties to tell

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the truth. *See* N.C. Gen. Stat. § 8C-1, Rule 601(b). In addition, the other evidence, including the testimony of Detective Noel and a videotape, entirely corroborated Mr. Asay's testimony against defendant. Although Mr. Asay's testimony with other evidence does not directly show Mr. Asay's competence as a witness, it does indicate that he was able to recall dates and events in a manner consistent with the other evidence.

Defendant further argues it was error for the trial court not to conduct a *voir dire* of Mr. Asay to assess his competency to testify. However, defendant had the opportunity to request a *voir dire* and did not. After Mr. Asay began his testimony, the trial court *sua sponte* raised its concern regarding his potential impairment, had him tested, and brought his impairment to the attention of the parties. Out of the presence of the jury, the trial court discussed the matter with counsel and sought their suggestions in how to proceed. The State noted it would call Mr. Asay's probation officer to testify regarding the drug testing so this information would be in evidence. The trial court also noted that the State should not question the probation officer regarding who initiated the drug testing because "maybe the jury may consider that as my questioning credibility[.]" but the trial court did allow defendant's counsel to question the probation officer on this subject in front of the jury. Thus, defendant's counsel elicited the probation officer's testimony that the trial judge had called for the testing of Mr. Asay. Defendant's counsel did not object to the measures the trial court discussed with counsel to address Mr. Asay's impairment, and again, did not request *voir dire* of Mr. Asay. Instead, defendant opted to move for mistrial and for disqualification of Mr. Asay as a witness.

When defendant made his motions, the trial court already had ample opportunity to observe Mr. Asay during his testimony, and those observations raised the trial court's suspicions of impairment. Defendant does not explain how having Mr. Asay questioned further on *voir dire* would reveal any additional information which may have required a different procedure. In denying the motion for disqualification, the trial court noted,

I heard the testimony. And I could understand – what he was saying and the transcript will reflect that the Court Reporter probably could understand also what he was saying.[<sup>1</sup>] There are parts that he – I thought he was slurring his words and required questions be repeated. The Court

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1. The trial court was correct. The transcript does not reflect any problems with transcription of the testimony.

## STATE v. BURGESS

[271 N.C. App. 302 (2020)]

was unaware whether this was the result of extensive drug use and he was suffering from some sort of damage that had been done to his language skills and mental faculties or not. But I think he was able to discuss the events of April 18, 2017, and was generally understandable by the jurors. The motion under Rule 601 – or the motions raised by the Defense under 601 are denied.

Our Supreme Court has noted that the trial court's observations of the witness put the trial court in the best position to assess the competency of a witness:

In addition, the trial court's determination that a witness is competent to testify is with good reason within the discretion of that court, which has the opportunity itself to observe the comportment of the witness. And where the effect of drug use is concerned, in particular, the question is more properly one of the witness's credibility, not his competence. As such, it is in the jury's province to weigh his evidence, not in the court's to bar it.

*State v. Fields*, 315 N.C. 191, 204, 337 S.E.2d 518, 526 (1985).

Defendant has not demonstrated any abuse of discretion by the trial court. Instead, the trial court initiated the investigation of Mr. Asay's impairment, advised counsel, solicited their arguments and suggestions on how to proceed, and gave a well-reasoned explanation of its rulings. Evidence of Mr. Asay's impairment was presented to the jury, and thus the jury was free to determine whether they found Mr. Asay's testimony credible. *See id.* Accordingly, this argument is overruled.

#### B. Motion for Mistrial

[2] Defendant also contends the trial court should have allowed his motion for a mistrial as “the single most important witness for the State testified while he was drug impaired.” “[A] mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict. Our standard of review when examining a trial court's denial of a motion for mistrial is abuse of discretion.” *State v. Jones*, 241 N.C. App. 132, 138, 772 S.E.2d 470, 475 (2015) (citation, quotation marks, ellipses, and brackets omitted).

Here, defendant has not alleged that Mr. Adam's testimony was incoherent or difficult to understand. Rather, defendant contends, without citing legal authority, that because Mr. Asay was under the influence of drugs when he testified, his testimony tainted his entire trial. In addition,

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the other evidence, including the testimony of Detective Noel and the videotape, corroborated Mr. Asay's testimony. As discussed above, the trial court found Mr. Asay was competent to testify and the jury was informed about his impairment during his testimony, and thus could consider his credibility and the weight to give to his testimony. As Mr. Asay was competent to testify and the jury was informed of his impairment, we see no basis for defendant's claim it was "impossible to attain a fair and impartial verdict[,]" *id.*, and therefore we do not conclude that the trial court abused its discretion. This argument is overruled.

## III. Conclusion

Therefore, we conclude there was no error.

NO ERROR.

Judges BERGER and COLLINS concur.

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STATE OF NORTH CAROLINA  
v.  
EDWARD BICKERTON LANE, JR.

No. COA19-877

Filed 5 May 2020

**1. Criminal Law—motion for appropriate relief—ineffective assistance of counsel—test distinguished from plain error review**

When denying defendant's motion for appropriate relief, after defendant's drug trafficking conviction was upheld on appeal because defendant failed to show plain error at trial where the jury was not instructed on the defense of possession pursuant to a valid prescription, the trial court erred in concluding that the prior holding of no plain error precluded a finding that defendant received ineffective assistance of counsel. Plain error review focuses on prejudice resulting from the trial court's errors rather than from counsel's errors and requires a stronger showing of prejudice than the test for finding ineffective assistance of counsel does. Nevertheless, the trial court properly denied defendant's motion for appropriate relief based on its separate analysis applying the test for ineffective assistance of counsel.

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[271 N.C. App. 307 (2020)]

**2. Criminal Law—motion for appropriate relief—right to evidentiary hearing—non-frivolous claims**

When reviewing defendant's motion for appropriate relief raising an ineffective assistance of counsel claim, the trial court erred in concluding that defendant's motion was frivolous where defendant raised good faith arguments supporting a modification or reversal of existing law. Nevertheless, the trial court properly concluded that defendant was not entitled to an evidentiary hearing under N.C.G.S. § 15A-1420 because his motion presented only questions of law.

Appeal by defendant from orders entered 18 May 2018 and 11 January 2019 by Judge Michael D. Duncan in Alleghany County Superior Court. Heard in the Court of Appeals 31 March 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Teresa M. Postell, for the State.*

*Yoder Law PLLC, by Jason Christopher Yoder, for defendant.*

ARROWOOD, Judge.

Edward Bickerton Lane, Jr. ("defendant") appeals from orders denying his motion for appropriate relief ("MAR") and motion for discovery. Defendant contends the trial court erred in concluding that a finding of no plain error precludes a finding of ineffective assistance of counsel and that defendant's MAR was frivolous. In the alternative, defendant contends the trial court erred in denying his motion for discovery and motion for post-conviction discovery where he was represented by counsel in a post-conviction proceeding pursuant to N.C. Gen. Stat. § 15A-1415(f). For the following reasons, we affirm the order of the trial court.

### I. Background

On 14 December 2016, defendant was convicted of trafficking in opium or heroin, resisting an officer, simple possession of marijuana, and possession of drug paraphernalia. At trial, the evidence tended to show the following.

Deputy Colt Kilby ("Deputy Kilby") testified that on 18 September 2014, he observed defendant driving above the speed limit, crossing the center line, and weaving within his lane. Deputy Kilby subsequently stopped defendant for the observed traffic violations. As he approached defendant's vehicle, Deputy Kilby detected the smell of both raw and

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burnt marijuana. Deputy Kilby conducted a search of defendant's vehicle and retrieved several items, including: a smoking pipe containing burnt marijuana residue; small clear plastic bags of marijuana; and plastic straws that had been cut up into several short pieces, which are often used to inhale ground-up prescription pills.

Deputy Kilby also retrieved an orange bottle of pills labeled "doxycycline" that was prescribed to defendant. Upon opening the bottle, he noticed the pills did not match the label. Another deputy found a single pill inside a small black container. While Deputy Kilby was distracted, defendant tossed the pills in the orange bottle about 10 to 15 feet away from the vehicle and into a nearby grassy area. Deputy Kilby recovered nineteen pills and the prescription bottle and arrested defendant. The pills were later identified as hydrocodone.

Defendant testified that in June 2014, he broke his left hand while at work. He received treatment for his injury at the hospital, in the course of which doctors put his hand in a cast and initially prescribed him twenty "hydrocodone fives" to take as needed for pain. Several days later, a specialist prescribed defendant an additional forty-five hydrocodone 10mg, a stronger medication. Defendant took the pills as needed and often kept the medication in his car. Defendant estimated that by September 2014, he had approximately twenty hydrocodone 10mg pills left. He also had a prescription filled in August for doxycycline, an antibiotic that treats pneumonia. Defendant testified that he had the hydrocodone pills in the car the night Deputy Kilby stopped him, and he kept a single hydrocodone pill in a separate container that he took with him to work. He further testified that he tossed the pills out while Deputy Kilby was searching his car because he "was irritated, very irritated."

A Walgreens pharmacist testified that on 13 June 2014, she filled a prescription for twenty hydrocodone of 5mg strength. On 16 June 2014, she filled a second prescription of forty-five hydrocodone 10mg. The pills were marked "Watson" and stamped with the number "853." The pharmacist further testified that if defendant had taken the second prescription according to the doctor's instructions, it would have lasted seven days.

At the close of the State's case and at the close of all the evidence, trial counsel moved to dismiss the trafficking charge on the ground that defendant's possession of hydrocodone was pursuant to a valid prescription from a licensed physician. During the jury charge conference, trial counsel for defendant did not request any jury instruction on the definition of "unlawful" in the context of trafficking by possession, or

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an instruction that possession pursuant to a valid prescription was a defense to trafficking by possession. However, on the charge of unlawfully and knowingly possessing with intent to use drug paraphernalia, the jury was instructed that opium is a controlled substance that is unlawful to possess without a valid prescription from a licensed physician. Defendant was found guilty of all charges and given a consolidated sentence of 70 to 93 months' imprisonment, in addition to a mandatory fine of \$50,000.00. Defendant appealed the matter to this Court.

On 14 June 2017, defendant filed an MAR contemporaneously with his appellant brief. On 19 December 2017, this Court held the trial court did not commit plain error because defendant could not establish he was prejudiced by the trial court's failure to instruct the jury on the defense of possession pursuant to a valid prescription. *State v. Lane*, Nos. 14 CRS 50314-15, 2017 WL 6460045, \*2 (N.C. App. Dec. 19, 2017). In addition, we dismissed defendant's MAR without prejudice to refile in the trial court. On 2 February 2018, the trial court appointed counsel to represent defendant on a potential MAR and gave defendant 120 days to file an MAR or file a written notice of intent not to file. On 14 March 2018, defendant filed a motion for discovery pursuant to N.C. Gen. Stat. § 15A-1415(f) and a proposed order. The trial court denied the motion on the grounds that there was no current post-conviction proceeding as defendant had not yet filed an MAR.

On 29 May 2018, defendant filed an MAR alleging the same ineffective assistance of counsel claim this Court previously dismissed without prejudice. Specifically, defendant argued he was denied his constitutional right to effective representation when his trial counsel failed to request a jury instruction that a valid prescription was a defense to trafficking in opium by possession. In the MAR, defendant also renewed his motion for discovery and requested an opportunity to amend his motion after receiving post-conviction discovery. On 11 January 2019, the trial court issued an order denying defendant's MAR. The trial court concluded that because this Court found defendant was not prejudiced under the plain error standard, defendant's ineffective assistance of counsel claim must also fail. On 7 June 2019, defendant filed a petition for *writ of certiorari* asking this Court to review the trial court's order denying defendant's MAR. Defendant also later filed a motion for initial *en banc* hearing. We granted *certiorari*, but denied the motion for an *en banc* hearing.

II. Discussion

On appeal, defendant argues that the trial court erred in concluding that a finding of no plain error precludes a finding of ineffective



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assistance of counsel and that his MAR was frivolous. In the alternative, defendant contends the trial court erred in denying his motion for discovery where he was represented by counsel in a post-conviction proceeding pursuant to N.C. Gen. Stat. § 15A-1415(f).

“Our review of a trial court’s ruling on a defendant’s MAR is ‘whether the findings of fact are supported by evidence, whether the findings of fact support the conclusions of law, and whether the conclusions of law support the order entered by the trial court.’” *State v. Peterson*, 228 N.C. App. 339, 343, 744 S.E.2d 153, 157 (2013) (quoting *State v. Stevens*, 305 N.C. 712, 720, 291 S.E.2d 585, 591 (1982)). “ ‘When a trial court’s findings on a motion for appropriate relief are reviewed, these findings are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court’s conclusions are fully reviewable on appeal.’ ” *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)).

1. Ineffective Assistance of Counsel

[1] Defendant first argues the trial court erred in concluding that a finding of no plain error requires a finding of no ineffective assistance of counsel. In support of his argument, defendant points to differences between the plain error standard and the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed.2d 674 (1984). We agree with defendant that the plain error standard and ineffective assistance of counsel test are not so similar that a finding of no plain error always precludes a finding of ineffective assistance of counsel.

The Sixth Amendment to the Constitution guarantees criminal defendants the right to counsel, which courts have recognized necessarily includes the right to effective assistance or representation by counsel. *Strickland*, 466 U.S. 668, 686, 80 L. Ed.2d at 692 (citing *McMann v. Richardson*, 397 U.S. 759, 771, n. 14, 25 L. Ed.2d 763, 773, n. 14 (1970)). Thus, ineffective assistance of counsel violates that right. In *Strickland*, the United States Supreme Court established the two-part test for ineffective assistance of counsel subsequently adopted by our Supreme Court years ago in *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). Pursuant to *Strickland*, when bringing an ineffective assistance of counsel claim, a defendant must do the following:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made error so serious that counsel was not functioning

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as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s error were [sic] so serious as to deprive the defendant of a fair trial, *a trial whose result is reliable*.

*Braswell*, 312 N.C. at 562, 324 S.E.2d at 248 (emphasis in original) (quoting *Strickland*, 466 U.S. at 687, 80 L. Ed.2d at 693). The Supreme Court, further elaborating on the prejudice prong, explained that “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 80 L. Ed.2d at 698.

In comparison, under North Carolina’s plain error standard:

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury’s finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted). Thus, plain error should only be found where “the claimed error is a ‘*fundamental*’ error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,’ or ‘where [the error] is grave error which amounts to a denial of a fundamental right of the accused,’ or the error has ‘resulted in a miscarriage of justice or in the denial to appellant of a fair trial.’” *Id.* at 516-17, 723 S.E.2d at 333 (emphasis in original) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

Notably, both the ineffective assistance of counsel test and the plain error standard require a showing of prejudice. Under the former, a defendant must show a “reasonable probability” the result of the proceeding would have been different, while under the latter, they must show the error had a “probable impact” on the jury’s finding of guilt. Given their similar language, the two prejudice inquiries initially appear to be the same. This Court has thus previously held that a finding of no prejudice under one also means the prejudice requirement of the other cannot be

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met as well, particularly in the context of jury instructions. *See State v. Land*, 223 N.C. App. 305, 316, 733 S.E.2d 588, 595 (2012), *aff'd*, 366 N.C. 550, 742 S.E.2d 803 (2013) (“Since the trial court did not commit plain error when failing to give the [jury] instructions at issue, defendant cannot establish the necessary prejudice required to show ineffective assistance of counsel for failure to request the instructions.”); *State v. Seagroves*, 78 N.C. App. 49, 54, 336 S.E.2d 684, 688 (1985) (“There being no ‘plain error’ in the jury instructions, defendant’s assertion of ineffective assistance of counsel with respect thereto must also fail.”).

However, a review of North Carolina appellate decisions on the matter reveals that there has been no thorough examination and comparison of the plain error standard and ineffective assistance of counsel test by this Court or our Supreme Court. We thus take the opportunity to do so here.

We first consider the differences in language used to articulate the two prejudice inquiries. Prejudice under plain error requires that the *trial court’s* error have had a “probable impact” on the jury’s finding of guilt. *Odom*, 307 N.C. at 660, 300 S.E.2d at 378. The plain error rule thus requires a defendant to show “[i]n other words, . . . that the error in question ‘tilted the scales’ and caused the jury to reach its verdict convicting the defendant.” *State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (citing *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 806-807 (1983)). In *State v. Juarez*, our Supreme Court emphasized that “[f]or plain error to be found, it must be probable, not just possible, that absent the instructional error the jury would have returned a different verdict.” 369 N.C. 351, 358, 794 S.E.2d 293, 300 (2016) (citing *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334). In *Lawrence*, that court illustrated the defendant’s high burden of proof under plain error, explaining that “[i]n light of the overwhelming and uncontroverted evidence, defendant cannot show that, absent the error, the jury probably would have returned a different verdict. Thus, he cannot show the prejudicial effect necessary to establish that the error was a fundamental error.” *Lawrence*, 365 N.C. at 519, 723 S.E.2d at 335.

In contrast, prejudice under the ineffective assistance of counsel test requires a showing of “reasonable probability” that, “but for *counsel’s* unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694, 80 L. Ed.2d at 698. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Under the reasonable probability standard, “a defendant need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” *Id.* at 693, 80 L. Ed.2d at 697. However,

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the defendant does need to demonstrate that “at least one juror would have struck a different balance.” *Wiggins v. Smith*, 539 U.S. 510, 537, 156 L. Ed.2d 471, 495 (2003).

While under the reasonable probability standard “[t]he likelihood of a different result must be substantial, not just conceivable[.]” *Harrington v. Richter*, 562 U.S. 86, 112, 178 L. Ed.2d 624, 647 (2011), it is something less than that required under plain error. In *State v. Sanderson*, our Supreme Court noted that we adopted the ineffective assistance of counsel test in *Strickland* as our own standard because it mirrored the language of our statutorily enacted test for prejudice under N.C. Gen. Stat. § 15A-1443(a). 346 N.C. 669, 684, 488 S.E.2d 133, 141 (1997). Pursuant to N.C. Gen. Stat. § 15A-1443(a), criminal defendants alleging prejudice due to errors preserved for review on appeal must demonstrate “a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial.” N.C. Gen. Stat. § 15A-1443(a) (2019). Importantly, “the test for ‘plain error’ places a much heavier burden upon the defendant than that imposed by [N.C. Gen. Stat.] § 15A-1443 upon defendants who have preserved their rights by timely objection.” *Walker*, 316 N.C. at 39, 340 S.E.2d at 83. It follows, then, that the prejudice prong of the ineffective assistance of counsel test, which is almost identical to the prejudice inquiry under N.C. Gen. Stat. § 15A-1443(a), also imposes a lesser burden than that imposed by plain error.

This line of reasoning is further supported by the Supreme Court’s decision in *Williams v. Taylor*, 529 U.S. 362, 146 L. Ed.2d 389 (2000). In discussing the ways in which a state-court decision would be contrary to clearly established precedent in *Strickland*, the *Williams* court noted that:

If a state court were to reject a prisoner’s claim of ineffective assistance of counsel on the grounds that the prisoner had not established by a preponderance of the evidence that the result of his criminal proceeding would have been different, that decision would be “diametrically different,” “opposite in character or nature,” and “mutually opposed” to our clearly established precedent because we held in *Strickland* that the prisoner need only demonstrate a “reasonable probability that . . . the result of the proceeding would have been different.

*Williams*, 529 U.S. at 405-406, 146 L. Ed.2d at 425-26 (citing *Strickland*, 466 U.S. at 694, 80 L. Ed.2d at 698). Thus, the “reasonable probability” standard of the ineffective assistance of counsel test can be satisfied by

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something less than the 51% certainty associated with the preponderance of the evidence standard. In contrast, the “probable impact” standard under plain error seems to require at least that much. *See Walker*, 316 N.C. at 39, 340 S.E.2d at 83 (holding that plain error requires that “the error in question ‘tilted the scales’ and caused the jury to reach its verdict convicting the defendant.”).

Moreover, other differences between the plain error standard and ineffective assistance of counsel test compel us to conclude that application of the two will not always necessarily lend the same results. On this point, we find the Fourth Circuit’s reasoning in *United States v. Carthorne*, 878 F.3d 458 (4th Cir. 2017) persuasive. There, the *Carthorne* court also considered the issue of “whether application of the plain error standard and the ineffective assistance of counsel standard ordinarily requires equivalent outcomes.” *Id.* at 464. Similar to defendant here, the defendant in *Carthorne* argued that the lower court erred “in concluding that the absence of plain error on direct appeal constituted a basis for denial of relief on collateral review for ineffective assistance of counsel.” *Id.* at 463.

As the *Carthorne* court noted, the plain error standard and ineffective assistance of counsel test “serve different, yet complementary, purposes,” with the former concerned with trial court errors and the latter with errors by counsel. *Id.* at 465. Though both require a showing of prejudice, they differ in several important respects.

The ineffective assistance inquiry focuses on a factor that is not considered in a plain error analysis, namely, the objective reasonableness of counsel’s performance. In addition, plain error review requires that there be settled precedent before a defendant may be granted relief, while the ineffective assistance standard may require that counsel raise material issues even in the absence of decisive precedent.

There is also a temporal distinction in the analysis performed under the two types of review. Claims of ineffective assistance are evaluated in light of the available authority at the time of counsel’s allegedly deficient performance. But the plain error inquiry applies precedential authority existing at the time of appellate review. These differences, considered collectively, demonstrate why claims of ineffective assistance of counsel are not limited by an appellate court’s analysis whether a trial court plainly erred.

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*Id.* at 465-66 (internal citations omitted). In addition, because ineffective assistance of counsel claims focus on the reasonableness of counsel's performance, courts can consider the cumulative effect of alleged errors by counsel. *See Williams*, 529 U.S. at 395-99, 146 L. Ed.2d at 419-21 (holding that the lower court correctly considered the cumulative effect of failure to raise mitigation evidence in ruling upon an ineffective assistance of counsel claim); *State v. Thompson*, 359 N.C. 77, 121-22, 604 S.E.2d 850, 880-81 (2004) (recognizing cumulative argument but dismissing ineffective assistance of counsel claim on other grounds). In contrast, prejudice under plain error is not reviewed on a cumulative basis. *State v. Holbrook*, 137 N.C. App. 766, 769, 529 S.E.2d 510, 512 (2000). Moreover, error that was invited by the defendant is not reviewable under plain error, *State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001), but may still form the basis of a successful ineffective assistance of counsel claim if counsel had no reasonable strategy for making the error.

The different purposes and concerns of the two standards thus play a significant role in shaping the outcome of their application. As long as counsel's deficient performance created a fundamentally unfair trial whose results were unreliable, an ineffective assistance of counsel claim will be successful despite the absence of plain error. *See Kimmelman v. Morrison*, 477 U.S. 365, 374, 91 L. Ed.2d 305, 318-19 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."). Accordingly, there will be instances in which the trial court committed no plain error but counsel rendered ineffective assistance, and vice versa. *See United States v. Span*, 75 F.3d 1383, 1389-90 (9th Cir. 1996) (holding that counsel's failure to raise an objection to jury instructions was ineffective assistance, even though district court's instructions were not plainly erroneous). In addition, as discussed *supra*, the different thresholds of prejudice (i.e. "reasonable probability" versus "probable impact") also mean that a claim that fails the plain error test may still be a successful ineffective assistance of counsel claim. Thus, while an analysis of plain error may inform an analysis of prejudice under the ineffective assistance of counsel test, it should not be determinative.

Having determined that sufficient differences exist between the plain error and ineffective assistance of counsel standards such that separate and independent inquiries are required, we now address whether the trial court properly dismissed the claims raised in defendant's MAR.

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In the present case, upon defendant's appeal of his criminal convictions to this Court, we previously held the trial court did not commit plain error when it failed to instruct the jury on the defense of possession pursuant to a valid prescription. *Lane*, Nos. 14 CRS 50314-15, 2017 WL 6460045, at \*2. In reaching our holding, we noted that defendant could not satisfy the prejudice requirement under the plain error standard because, in light of the ample evidence from which the jury could deduce defendant did not possess the hydrocodone pills lawfully, it was very likely the jury would have reached the same conclusion even absent the trial court's alleged error. *Id.* Because we found no plain error, the trial court subsequently denied defendant's MAR alleging ineffective assistance of counsel, reasoning that it was compelled by this Court's precedent to deny defendant's ineffective assistance of counsel claim where there was no plain error.

In the alternative, the trial court, adopting our reasoning in *Lane*, concluded that, based on the evidence presented at trial, defendant failed to establish a reasonable probability that the result of the proceeding would have been different had trial counsel requested the valid prescription jury instruction. Because as analyzed above, a finding of no plain error does not preclude a finding of ineffective assistance of counsel, the trial court erred in dismissing defendant's claim on that basis. However, to the extent the trial court conducted a *Strickland* analysis of defendant's ineffective assistance of counsel claim in its alternative holding, we affirm on that ground.

As discussed *supra*, under *Strickland*, we apply a two-part test to determine whether a defendant was denied effective assistance of counsel. First, the defendant must show his counsel's performance was deficient, such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed.2d at 693. Second, the defendant must show counsel's alleged errors prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed.2d at 698.

In the present case, defendant was charged and convicted of trafficking opium by possession. Lawful possession is a defense to Section 90-95 of the Controlled Substances Act, which "makes the possession, transportation[,] or delivery of a controlled substance a crime." *State v. Beam*, 201 N.C. App. 643, 649, 688 S.E.2d 40, 44 (2010). Pursuant to N.C. Gen. Stat. § 90-101(c)(3), an individual lawfully possesses a controlled substance if they are "[a]n ultimate user or a person in possession



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of any controlled substance pursuant to a lawful order of a practitioner.” N.C. Gen. Stat. § 90-101(c)(3) (2019). An “ultimate user” is “a person who lawfully possesses a controlled substance for his own use, or for the use of a member of his household.” N.C. Gen. Stat. § 90-87(27) (2019).

Defendant’s entire defense to trafficking opium by possession rested on his assertion he possessed the hydrocodone pills pursuant to a valid prescription. At trial, there was conflicting evidence on that issue. Though defendant at one point had a valid prescription for 45 pills of 10mg hydrocodone, that prescription was only supposed to last seven days and was filled three months prior to defendant’s encounter with law enforcement. During the search of defendant’s car, twenty hydrocodone pills were found in a prescription bottle labeled “doxycycline,” and defendant attempted to get rid of the pills while the deputies searching his car were distracted. Deputies also found several cut up straws commonly used to inhale crushed pills. Despite evidence supporting a theory of illegal possession, however, there was also some evidence that defendant lawfully possessed the pills as well. While testimony by defendant’s pharmacist indicated the pills prescribed to defendant would only last seven days if taken as prescribed, according to defendant, he only took them “as needed for pain.” In addition, the pills recovered by law enforcement were marked “Watson 853,” similar to the pills prescribed to defendant.

At the close of all the evidence, trial counsel for defense moved to dismiss the trafficking charge on the ground that defendant’s possession of hydrocodone was pursuant to a valid prescription. However, trial counsel failed to request a jury instruction on the defense defendant lawfully possessed the hydrocodone pills. After the jury charge, trial counsel also failed to object to any of the instructions given. “Failure to instruct upon all substantive or material features of the crime charged is error.” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citing *State v. Loftin*, 322 N.C. 375, 368 S.E.2d 613 (1988)). “All defenses arising from the evidence presented during the trial constitute substantive features of a case and therefore warrant the trial court’s instruction thereon.” *Loftin*, 322 N.C. at 381, 368 S.E.2d at 617 (citations omitted). Because defendant presented evidence he lawfully possessed the hydrocodone pills, he was entitled to a jury instruction on that defense. Though trial counsel argued throughout the trial that defendant possessed the pills pursuant to a valid prescription, “ ‘[o]n matters of law, arguments of counsel do not effectively substitute for statements by the court.’ ” *State v. Locklear*, 363 N.C. 438, 466, 681 S.E.2d 293, 313 (2009) (quoting *State v. Spruill*, 338 N.C. 612, 654, 452 S.E.2d 279, 302 (1994)).



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Whether trial counsel's performance was deficient because she failed to request a jury instruction on the lawful possession defense depends on whether her conduct "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688, 80 L. Ed.2d at 693. There is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and to overcome this presumption defendant must show that the challenged action cannot be considered sound trial strategy. *Id.* at 689, 80 L. Ed.2d at 694-95. As the trial court noted, the burden of proof for proving an exemption to the Controlled Substances Act, including the "ultimate user" exemption, lies with the defendant. Thus, had trial counsel requested the valid prescription instruction, she could have risked highlighting this burden to the jury and possibly negating the value of the evidence that defendant lawfully possessed the pills.

Even assuming counsel's performance was deficient, however, "[t]he fact that counsel made an error, even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 694, 80 L. Ed.2d at 698). Importantly, "*Strickland* asks whether it is 'reasonably likely' the result would have been different[.]" and "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington*, 562 U.S. at 111-12, 178 L. Ed.2d. at 647 (citing *Strickland*, 466 U.S. at 693, 696, 80 L. Ed.2d at 697, 699). Though defendant argues it is possible that "at least one juror would have struck a different balance" if presented with the valid prescription defense, we think it more probable that the result of the proceeding would have been the same.

The jury was presented with evidence defendant possessed the pills pursuant to a valid prescription and also heard trial counsel argue defendant's lawful possession of the pills several times. In addition, on the charge of unlawfully and knowingly possessing with intent to use drug paraphernalia, the jury was instructed that opium is a controlled substance that is unlawful to possess without a valid prescription from a licensed physician. Under these facts, trial counsel's failure to request that the jury be instructed on the definition of "unlawful" and on the defense of possession pursuant to a valid prescription does not "undermine confidence" in the result and create a reasonable probability that the result of the proceeding would have been different. We therefore affirm the order of the trial court.

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2. MAR not Frivolous

[2] Defendant next argues the trial court erred in finding that his MAR was frivolous and without merit pursuant to N.C. Gen. Stat. § 15A-1420 and thus not entitled to an evidentiary hearing. When considering a motion for appropriate relief, “[t]he judge assigned to the motion shall conduct an initial review of the motion. If the judge determines that all of the claims alleged in the motion are frivolous, the judge shall deny the motion.” N.C. Gen. Stat. § 15A-1420(b1)(3) (2019). Furthermore “[a]ny party is entitled to a hearing on questions of law or fact arising from the motion and any supporting or opposing information presented unless the court determines that the motion is without merit.” N.C. Gen. Stat. § 15A-1420(c)(1). The term “frivolous” is not defined by statute. However, our case law has defined frivolous claims as those claims that have no merit. *See State v. Kinch*, 314 N.C. 99, 102, 331 S.E.2d 665, 666 (1985) (holding that a finding of no merit in assignments of error “is tantamount to a conclusion that the appeal is wholly frivolous.”). Non-meritorious or frivolous claims are those that are “not well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.” *Long v. Long*, 119 N.C. App. 500, 507, 459 S.E.2d 58, 63 (1995) (citing N.C.R. App. P. 34(a)(1)).

Here, the trial court denied defendant’s MAR on the basis his ineffective assistance of counsel claim could not succeed given this Court already found no plain error occurred at trial. Relying on this Court’s prior holdings, which did not address the differences between plain error and the ineffective assistance of counsel test, the trial court found that existing law did not support defendant’s argument. However, to the extent that defendant argued in good faith for a modification or reversal of existing law, his MAR was not frivolous. Because defendant raised arguments not yet addressed by North Carolina appellate courts that support a modification or reversal of existing law, the trial court erred in finding his MAR to be frivolous and without merit. Nevertheless, because “[t]he court must determine the motion without an evidentiary hearing when the motion and supporting and opposing information present only questions of law[,]” the trial court properly concluded defendant was not entitled to an evidentiary hearing. N.C. Gen. Stat. § 15A-1420(c)(3).

Defendant lastly contends that, in the alternative, the trial court erred in denying his motion for discovery and renewed motion for discovery in contravention of N.C. Gen. Stat. § 15A-1415(f). Because we hold defendant did not receive ineffective assistance of counsel, we decline to address his argument.

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**III. Conclusion**

For the foregoing reasons, we affirm the order of the trial court.

**AFFIRMED.**

Judges BRYANT and DIETZ concur.

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STATE OF NORTH CAROLINA  
v.  
ROBERT PRINCE, DEFENDANT

No. COA19-338

Filed 5 May 2020

**Sentencing—assault with a deadly weapon with intent to kill  
inflicting serious injury—assault by strangulation—arising  
from same conduct**

The trial court erred in sentencing defendant for both assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation where defendant beat the victim with his fists and strangled her and the evidence tended to show a single prolonged assaultive act with no distinct interruption between two assaults. Therefore, the Court of Appeals vacated the strangulation conviction and remanded for resentencing.

Judge BERGER dissenting.

Appeal by defendant from judgment entered 10 July 2018 by Judge Nathaniel J. Poovey in Gates County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Terence Steed, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.*

YOUNG, Judge.

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Where defendant was sentenced for the offenses of assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation arising from the same conduct, in violation of statutory mandate, the trial court erred in sentencing defendant on the latter charge. We vacate that conviction, and remand for resentencing.

**I. Factual and Procedural Background**

On 30 July 2016, Linda Prince (Linda) went to visit her daughters. After she had been visiting for a short time, her husband, Robert Prince (defendant) arrived and demanded that Linda return home, which she did.

When they arrived, defendant began arguing with Linda at the kitchen table. He was drinking whiskey from a bottle and pointing guns at her. He forced her to call her father and tell him she was using drugs, called her father himself and insisted that Linda had taken an entire bottle of Xanax, and forced Linda at gunpoint to write a note saying goodbye to her loved ones. During this time, one of her daughters, Janita Thomason (Thomason), called Linda multiple times. One phone call was successful, and Linda confirmed that defendant was pointing a gun at her; no other attempts by Thomason to reach Linda were successful.

After she was unable to reach her mother again, Thomason rushed to the house with her son and boyfriend. She knocked, and defendant let her in. Defendant was sweaty and had blood on his clothes. She found Linda unconscious on the floor, with her face covered in blood and her clothing ripped. Thomason attempted to call emergency services, but defendant insisted that he did not want an ambulance or police at his home. Defendant picked Linda up and took her out to Thomason's car, depositing the body on top of Thomason's son in the backseat, and said, "carry the bitch and dump her in a ditch."

En route to the nearest hospital, Thomason encountered a State Highway Patrol Trooper, who provided emergency aid and called for an ambulance. Linda was ultimately taken to a hospital, where she spent three days in recovery. She suffered a bruises around her neck, brain bleed, multiple contusions, and burst blood vessels in her eyes. She could not bend over for six weeks due to concerns it would exacerbate her brain bleed.

Defendant was indicted by the Gates County Grand Jury for assault with a deadly weapon with intent to kill inflicting serious injury, assault by strangulation, and assault inflicting serious bodily injury. At the close of all the evidence, the State voluntarily dismissed the charge of assault inflicting serious bodily injury. The jury returned verdicts finding

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defendant guilty of the remaining two charges. The trial court consolidated the two offenses for judgment, and sentenced defendant to a minimum of 73 and a maximum of 100 months in the custody of the North Carolina Department of Adult Correction.

Defendant appeals.

**II. Standard of Review**

“[W]hen a trial court acts contrary to a statutory mandate, the defendant’s right to appeal is preserved despite the defendant’s failure to object during trial.” *State v. Jamison*, 234 N.C. App. 231, 237, 758 S.E.2d 666, 671 (2014) (citations and quotation marks omitted). “Issues of statutory construction are questions of law, reviewed de novo on appeal.” *Id.* at 238, 758 S.E.2d at 671 (citation and quotation marks omitted).

**III. Statutory Compliance**

In his sole argument on appeal, defendant contends that the trial court erred in entering judgment and conviction on the charge of assault by strangulation when defendant was also convicted on the greater charge of assault with a deadly weapon with intent to kill inflicting serious injury. We agree.

The two charges which proceeded to the jury were assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation. The former is defined by statute as a Class C felony. N.C. Gen. Stat. § 14-32(a) (2019). The latter is defined by statute as a Class H felony. N.C. Gen. Stat. § 14-32.4(b) (2019). However, the statute on assault by strangulation contains a caveat: the statute applies “[u]nless the conduct is covered under some other provision of law providing greater punishment[.]” *Id.* On appeal, defendant contends that, because the conduct was covered under the statutory definition of assault with a deadly weapon with intent to kill inflicting serious injury – a Class C felony, and thus a greater punishment – it was error in violation of statutory mandate for the trial court to sentence defendant on assault by strangulation.

Defendant is correct in principle. This Court has held that, where the same conduct gave rise to charges of both assault with a deadly weapon with intent to kill inflicting serious injury and assault inflicting serious bodily injury – the latter of which contains the same “other provision of law” caveat – the trial court violated double jeopardy in sentencing the defendant on both charges. *State v. Ezell*, 159 N.C. App. 103, 110-11, 582 S.E.2d 679, 684-85 (2003). Indeed, this Court has long held that it is “improper to have two bills of indictment and two offenses growing

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out of this one episode” of assault. *State v. Dilldine*, 22 N.C. App. 229, 231, 206 S.E.2d 364, 366 (1974). Rather, the evidence must show that “two separate and distinct assaults occurred” in order to support more than one charge. *State v. McCoy*, 174 N.C. App. 105, 116, 620 S.E.2d 863, 872 (2005), *writ denied, disc. review denied*, \_\_\_ N.C. \_\_\_, 628 S.E.2d 8 (2006).

The State contends that the charges against defendant did not arise from a single action. The indictment for assault with a deadly weapon with intent to kill inflicting serious injury alleged that defendant assaulted Linda “with a series of strikes with fists and hands, a deadly weapon, with the intent to kill, inflicting serious injury.” In support of this charge, the State introduced evidence of Linda’s bodily bruises, swollen black eyes, concussion, and brain injuries. By contrast, the indictment for assault by strangulation alleges that defendant assaulted Linda “and inflict[ed] serious injury, severe bruising to her neck and throat by strangulation with his hands.” In support of this charge, the State introduced evidence of bruising, handprints and fingerprints around Linda’s neck. Based upon this, the State contends that the jury could properly find two separate assaults – one bodily assault with fists, and one specific strangulation – to support two separate charges.

To establish that two assaults occurred, the State must demonstrate that a “distinct interruption” occurred between them. *State v. Brooks*, 138 N.C. App. 185, 189, 530 S.E.2d 849, 852 (2000). It is here that the State’s argument fails. The record does not reveal that there was a “distinct interruption” between two assaults. Indeed, the State’s evidence tends to suggest that Linda’s injuries were the result of a single, if prolonged, assaultive act. Nor does the State cite any specific evidence of a distinct interruption, instead relying upon the different nature of Linda’s injuries to suggest different acts which may have caused them.

Moreover, there is an abundance of case law to suggest that these two assaults were in fact one assault, a single transaction resulting in multiple, albeit horrific, injuries. For example, in *State v. Williams*, the evidence tended to show that the defendant struck the victim, pushed his knee into her pelvic bone and pressed against her throat, then put his foot on her neck and pressed down, while putting his other foot on her rib cage until it popped. 201 N.C. App. 161, 168, 689 S.E.2d 412, 415 (2009). The defendant was charged with assault inflicting serious bodily injury, a Class F felony, and assault by strangulation, a Class H felony. On appeal, the defendant contended that it was error to sentence him on both charges, due to the “other provision of law” caveat. We agreed, holding that the defendant should “only be sentenced for the

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higher of the two offenses, assault inflicting serious bodily injury.” *Id.* at 174, 689 S.E.2d at 419. We therefore vacated the judgment on the assault by strangulation charge, and remanded for resentencing.

Similarly, in *State v. McPhaul*, we held that the defendant’s charges for assault with a deadly weapon with intent to kill inflicting serious injury and assault inflicting serious bodily injury arose from the same conduct, in that there was “no evidence of a ‘distinct interruption’ in the assault.” \_\_\_ N.C. App. \_\_\_, \_\_\_, 808 S.E.2d 294, 306 (2017) (citation omitted), *disc. review improvidently allowed*, \_\_\_ N.C. \_\_\_, 818 S.E.2d 102 (2018). As a result, we held that the trial court erred in entering judgment on the lesser of the two offenses, and vacated that judgment. *Id.*

Our precedent is clear. In the absence of evidence that the assaults were in fact two separate actions – that is, in the absence of evidence of a “distinct interruption” in the assault – the evidence could only support a finding of a single course of conduct, a single assault. As such, the two charges – assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation – arose from the same conduct. Because of the statutory language in the latter charge, we hold that it was error for the trial court to sentence defendant on both charges. We therefore vacate defendant’s conviction for assault by strangulation. Because the two convictions were consolidated for judgment, we remand this matter to the trial court for resentencing.

VACATED AND REMANDED.

Judge ZACHARY concurs.

Judge BERGER dissents in separate opinion.

BERGER, Judge, dissenting in separate opinion.

Defendant argues that N.C. Gen. Stat. § 14-32.4(b) precludes conviction of assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation.<sup>1</sup> However, because strangulation and striking the victim in the face with hands and fists is not the same “conduct,” I respectfully dissent.

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1. Defendant did not argue in the trial court, nor does he argue on appeal, that double jeopardy precludes his conviction and sentencing for assault by strangulation and assault with a deadly weapon inflicting serious injury.

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The plain language of Section 14-32.4(b) demonstrates that the legislature was attempting to address a particular type of violent conduct inflicted upon a victim: strangulation inflicting serious injury. However, if a defendant's conduct in strangling the victim also constituted a higher-level assault for which greater punishment could be imposed, then Defendant could not be sentenced pursuant to Section 14-32.4(b) and the higher-level offense. Applying a plain reading of the statute to the facts of this case, Defendant's argument fails. Hitting someone with your fists is different conduct than strangling them.

Assault by strangulation inflicting serious injury is a Class H felony “[u]nless *the conduct* is covered under some other provision of law providing greater punishment.” N.C. Gen. Stat. § 14-32.4(b) (2019) (emphasis added). This Court has held that the prefatory clause in that section “indicates legislative intent to punish certain offenses at a certain level, but that *if the same conduct* was punishable under a different statute carrying a higher penalty, defendant could only be sentenced for that higher offense.” *State v. Lanford*, 225 N.C. App. 189, 197, 736 S.E.2d 619, 625 (2013) (emphasis in original) (citations and brackets omitted).

This Court recently addressed this issue in *State v. Dew*, No. COA19-737, 2020 WL 1264021 (N.C. Ct. App. Mar. 17, 2020). In that case, this Court set forth the law to be applied when analyzing issues of multiple assaults.

“In order for a defendant to be charged with multiple counts of assault, there must be multiple assaults.” *State v. McCoy*, 174 N.C. App. 105, 115, 620 S.E.2d 863, 871 (2005) (citation and quotation marks omitted). To establish that multiple assaults occurred, there must be “a distinct interruption in the original assault followed by a second assault[,] so that the subsequent assault may be deemed separate and distinct from the first.” *State v. Littlejohn*, 158 N.C. App. 628, 635, 582 S.E.2d 301, 307 (2003) (*purgandum*). To determine whether Defendant's conduct was distinct, we are to consider: (1) whether each action required defendant to employ a separate thought process; (2) whether each act was distinct in time; and (3) whether each act resulted in a different outcome. *State v. Rambert*, 341 N.C. 173, 176-77, 459 S.E.2d 510, 513 (1995).

In *State v. Wilkes*, 225 N.C. App. 233, 736 S.E.2d 582 (2013), the defendant initially punched the victim in the face, breaking her nose, causing bruising to her face, and damaging her teeth. The victim's son entered the room where the incident occurred with a baseball bat and hit



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the defendant. *Id.* at 235, 736 S.E.2d at 585. The defendant was able to secure the baseball bat from the child, and he began striking the victim with it. *Id.* at 235, 736 S.E.2d at 585. The defendant's actions in the subsequent assault "crushed two of [the victim]'s fingers, broke[] bones in her forearms and her hands, and cracked her skull." *Id.* at 235, 736 S.E.2d at 585.

This Court, citing our Supreme Court in *Rambert*, determined that there was not a single transaction, but rather "multiple transactions," stating, "[i]f the brief amount of thought required to pull a trigger again constitutes a separate thought process, then surely the amount of thought put into grabbing a bat from a twelve-year-old boy and then turning to use that bat in beating a woman constitutes a separate thought process." *Wilkes*, 225 N.C. App. at 239-40, 736 S.E.2d at 587.

In *State v. Harding*, 258 N.C. App. 306, 813 S.E.2d 254, 263, writ denied, review denied, 371 N.C. 450, 817 S.E.2d 205 (2018), this Court again applied the "separate-and-distinct-act analysis" from *Rambert*, and found multiple assaults "based on different conduct." *Id.* at 317, 813 S.E.2d at 263. There, the defendant "grabb[ed the victim] by her hair, toss[ed] her down the rocky embankment, and punch[ed] her face and head multiple times." *Id.* at 317, 813 S.E.2d at 263. The defendant also pinned down the victim and strangled her with his hands. This Court determined that multiple assaults had occurred because the "assaults required different thought processes. Defendant's decisions to grab [the victim]'s hair, throw her down the embankment, and repeatedly punch her face and head required a separate thought process than his decision to pin down [the victim] while she was on the ground and strangle her throat to quiet her screaming." *Id.* at 317-18, 813 S.E.2d at 263. This Court also concluded that the assaults were distinct in time, and that the victim sustained injuries to different parts of her body because "[t]he evidence showed that [the victim] suffered two black eyes, injuries to her head, and bruises to her body, as well as pain in her neck and hoarseness in her voice from the strangulation." *Id.* at 318, 813 S.E.2d at 263.

*Id.*

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The majority acknowledges that there were two assaults, but concludes that Defendant's conduct in striking the victim with his fists and hands is the same conduct as strangling the victim.<sup>2</sup> However, the majority reaches this result without conducting a *Rambert* analysis, or discussing that decision from our Supreme Court. Instead, the majority relies on *State v. Williams*, 201 N.C. App. 161, 689 S.E.2d 412 (2009), which also failed to discuss *Rambert*, and *State v. McPhaul*, 256 N.C. App. 303, 808 S.E.2d 294 (2017), which involved a robbery with a baseball bat in which the victim was struck three times in succession.

In the present case, the victim was unable to recall many of the details due to the severity of her injuries that resulted from Defendant's conduct. However, the evidence at trial tended to show that Defendant severely beat the victim in the face using both of his fists. The State introduced the victim's "Prehospital Care Report" without objection. This exhibit, which was published to the jury, contained the following statement: an EMT "stepped out of the ambulance to talk to one of the daughters and they stated they had tried to call [the victim] for an hour and went over to [the victim's] house and found [Defendant] over top of her beating her with his *fists*." (Emphasis added). The victim suffered significant bruising and swelling to the left side of her face, among other injuries. The State also introduced into evidence several photographs which showed the victim's external injuries. State's Exhibits 5, 6, 7, and 8 showed bruising and swelling to the victim's left eye.

At some point, Defendant stopped punching the victim in the face with both hands, and he began to strangle her. State's Exhibits 5, 6, 9, and 10 showed a handprint, bruising, and abrasions to the left side of the victim's neck.

Based on this evidence, Defendant's conduct in assaulting the victim with both fists was different and distinct from his conduct in strangling the victim. First, the two actions required different thought processes. Defendant's decision to strike the victim repeatedly in the face required a different thought process from his decision to place his hand upon her throat and strangle her to the point of vomiting. In addition, these two assaults were distinct in time because Defendant had to cease punching the victim in the face with both fists in order to carry out the assault by strangulation. Finally, the injuries sustained by the victim were to different body parts. The injuries from the assault with a deadly weapon inflicting serious injury caused visible injury to the victim's face, especially her left eye, while her neck clearly showed a handprint and

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2. Per the majority opinion, "these two assaults were in fact one assault."

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bruising resulting from the assault by strangulation. Based on these factors, as established by *Rambert*, Defendant assaulted the victim multiple times.

In addition, the trial court instructed the jury on two assaults arising from Defendant's differing conduct. Defendant was indicted for assaulting the victim and "inflict[ing] serious injury, severe bruising to [the victim's] neck and throat[,] by strangulation with his hands." With regard to that offense, the trial court instructed the jury as follows:

Defendant has also been charged with assault inflicting physical injury by strangulation. For you to find the defendant guilty of this offense, the State must prove two things beyond a reasonable doubt. First, that the defendant assaulted [the victim] *by intentionally strangling her, and, second, that the defendant inflicted physical injury upon [the victim]*. If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally assaulted [the victim] inflicting physical injury by strangulation, it would be your duty to return a verdict of guilty to that charge. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty to that charge.

(Emphasis added).

Defendant was also indicted for assault with a deadly weapon inflicting serious injury pursuant to N.C. Gen. Stat. § 14-32 for assaulting the victim "with a series of strikes with fists and hands." The trial court instructed the jury that to find Defendant guilty of assault with a deadly weapon inflicting serious injury, the jury was required to find

beyond a reasonable doubt that on or about the alleged date, the defendant intentionally struck [the victim] with his fists or hands and that the defendant's fists or hands were deadly weapons and that the defendant inflicted serious injury upon [the victim.]

Thus, there was no error because the conduct at issue here, an assault by intentionally strangling the victim, is not the same conduct as intentionally striking the victim with fists or hands.

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[271 N.C. App. 330 (2020)]

STATE OF NORTH CAROLINA

v.

MATTHEW WILLIAM RAY

No. COA19-700

Filed 5 May 2020

**1. Appeal and Error—waiver—Fourth Amendment argument—fruits of unlawful search—no motion to suppress**

In a drug trafficking case, defendant waived any right to appellate review—including plain error review—of his argument that police illegally seized him before obtaining his consent to search his vehicle and that, therefore, the trial court erred by admitting into evidence hydrocodone tablets the officers found during the search. At no point before or during trial did defendant move to suppress the hydrocodone tablets, and therefore his Fourth Amendment argument was not appealable.

**2. Attorney Fees—criminal case—court-appointed attorney—notice and opportunity to be heard**

In a drug trafficking prosecution, the trial court's civil judgments imposing attorney fees and an attorney appointment fee were vacated and remanded where the court entered the judgments without first providing defendant with notice and an opportunity to be heard pursuant to N.C.G.S. § 7A-455, which requires a court to conduct a colloquy with a defendant—personally, not through counsel—regarding the imposition of attorney fees.

Appeal by defendant from judgments entered 28 November 2018 by Judge Athena F. Brooks in Haywood County Superior Court. Heard in the Court of Appeals 22 January 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Steven Armstrong, for the State.*

*The Epstein Law Firm PLLC, by Drew Nelson, for defendant-appellant.*

ZACHARY, Judge.

Defendant Matthew William Ray appeals from judgments entered upon a jury's verdicts finding him guilty of trafficking in opium or heroin by possessing and transporting 28 grams or more. Defendant argues that

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the trial court (1) committed plain error by allowing the State to introduce into evidence hydrocodone tablets collected by law enforcement officers during a search of Defendant's vehicle; and (2) erred by entering two civil judgments for fees without first providing Defendant with notice and an opportunity to be heard. After careful review, we hold that Defendant waived any right to appellate review of his claim of plain error, and dismiss this claim. Further, we vacate the trial court's civil monetary judgments, and remand for further proceedings on this issue.

**Background**

On 30 April 2018, Detectives Robert Skiver and Brad Miller of the Waynesville Police Department and Detective Mitch McAbee of the Haywood County Sheriff's Office sat in an unmarked surveillance van in a church's parking lot in Waynesville, North Carolina. The detectives were "not a routine patrol."

After a while, the detectives observed Defendant drive by in a white Ford Ranger with a "Century Appliance" sign on its side, traveling at a high rate of speed in a 35-mile-per-hour zone. Due to the vehicle's speed, the detectives immediately pulled out behind Defendant's truck and followed him for approximately two miles.<sup>1</sup> While following Defendant, they observed that one of the truck's taillights was broken. They also observed the truck drift over the double line and into the other lane of travel before ultimately turning—without signaling—into the parking lot of Defendant's workplace, Century Appliance, where he exited the truck. The detectives parked "caddy-corner [sic] to the left side of his vehicle" and approached Defendant "to talk to him about his driving."<sup>2</sup>

While speaking with Defendant, Detective Skiver noticed a firearm laying on the front seat of Defendant's truck, and he "retrieved the gun for safety purposes." Detective Skiver handed the gun to Detective McAbee, who "put it in a safe place" inside of the detectives' unmarked vehicle while Detectives Miller and McAbee continued to speak with Defendant. After securing the firearm, Detective Skiver requested Defendant's permission to search the vehicle. Defendant gave his consent.

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1. Detective McAbee testified that it is common practice for the "unit" to engage in such activity. Detective Skiver noted that the Waynesville Police Department is "very undermanned, very understaffed. [Routine patrols] were all busy with calls; could not get anyone to respond or get anyone there."

2. The detectives were wearing plain clothes when they approached Defendant. However, they properly displayed their badges and identified themselves as law enforcement officers before engaging with Defendant.

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During his search of Defendant's vehicle, Detective Skiver discovered "a little baggie with some crystalized residue in it and a straw that was . . . consistent with a straw that's modified for snorting or ingesting a controlled substance." He also discovered a plastic bag containing 90 hydrocodone tablets, wrapped in a paper bag and placed in a cooler. He issued Defendant a warning citation for speeding, and arrested Defendant for transporting 28 grams or more of opiates. *See* N.C. Gen. Stat. § 90-95(H)(4)(c) (2019).

After his arrest, a Haywood County grand jury returned a true bill of indictment formally charging Defendant with trafficking in opium or heroin by possessing and transporting 28 grams or more.<sup>3</sup> On 27 November 2018, Defendant's case came on for a jury trial before the Honorable Athena F. Brooks in Haywood County Superior Court. At no point during the proceedings—neither prior to nor during trial—did Defendant move to suppress the 90 hydrocodone tablets discovered during Detective Skiver's search of Defendant's truck. At the conclusion of all of the evidence, the jury returned verdicts finding Defendant guilty of both charges.

On 28 November 2018, the trial court entered two judgments, sentencing Defendant to two consecutive terms of 225 to 282 months in the custody of the North Carolina Division of Adult Correction and imposing two fines of \$500,000 each. The trial court also entered two civil judgments against Defendant, ordering him to pay \$3,975 in attorney's fees and a \$60 attorney-appointment fee.

Defendant gave oral notice of appeal from the trial court's judgments in open court. Defendant subsequently filed a petition for writ of certiorari with this Court, seeking review of the monetary civil judgments entered by the trial court. In our discretion, we allow Defendant's petition.

**Discussion**

The dispositive issue in this case rests on Defendant's Fourth Amendment argument that he was "illegally seized by the police immediately prior to giving consent to search his vehicle," thereby invalidating his consent. Defendant contends that, as a result, the trial court committed plain error by allowing the State to introduce evidence of the 90 hydrocodone tablets discovered during Detective Skiver's search

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3. A 9 July 2018 indictment erroneously charged Defendant with two counts of trafficking in opium or heroin by possessing 28 grams or more. The error was corrected in a superseding indictment issued on 10 September 2018.

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of his vehicle. However, we dismiss this argument because we conclude that Defendant has waived appellate review of this issue.

I. Appellate Waiver

[1] “A motion to suppress evidence . . . is the exclusive method of challenging the admissibility of evidence” when a party seeks to suppress unlawfully obtained evidence. N.C. Gen. Stat. § 15A-979(d).

With limited exception, a criminal defendant “may move to suppress evidence only prior to trial[.]” *Id.* § 15A-975(a). In any case, “the governing statutory framework requires a defendant to move to suppress at *some* point during the proceedings of his criminal trial.” *State v. Miller*, 371 N.C. 266, 269, 814 S.E.2d 81, 83 (2018). He certainly “cannot move to suppress for the first time *after* trial.” *Id.* Yet, that is essentially what a defendant is doing when he raises Fourth Amendment arguments for the first time on appeal. *Id.*

“When a defendant files a motion to suppress before or at trial . . . that motion gives rise to a suppression hearing and hence to an evidentiary record pertaining to that defendant’s suppression arguments.” *Id.* Indeed, “[f]act-intensive Fourth Amendment claims . . . require an evidentiary record developed at a suppression hearing.” *Id.* at 270, 814 S.E.2d at 83-84. “Without a fully developed record, an appellate court simply lacks the information necessary to assess the merits of a defendant’s plain error arguments.” *Id.* at 270, 814 S.E.2d at 83.

Here, Defendant argues that the trial court committed plain error in admitting evidence of the 90 hydrocodone tablets discovered during Detective Skiver’s search of his vehicle. Specifically, Defendant contends that he was “illegally seized” when the detectives secured his firearm, and that this seizure invalidated his subsequent consent to search the truck, thereby rendering the hydrocodone tablets the fruit of an unlawful search. However, Defendant acknowledges that he failed to move to suppress the hydrocodone tablets’ admission into evidence.

Defendant’s argument is foreclosed by *State v. Miller*, 371 N.C. 266, 814 S.E.2d 81 (2018), in which our Supreme Court addressed, as a matter of first impression, “whether plain error review is available when a defendant has not moved to suppress.” 371 N.C. at 269, 814 S.E.2d at 83. In *Miller*, the defendant was arrested after law enforcement officers searched his vehicle and found cocaine. *Id.* at 267, 814 S.E.2d at 82. The defendant did not move to suppress evidence of the cocaine at any point prior to or during his trial. *Id.* at 268, 814 S.E.2d at 82. On appeal to this Court, the defendant sought plain error review of the trial

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court's admission of the cocaine, as well as testimony from the officer who discovered it, contending that "the seizure of the cocaine resulted from various Fourth Amendment violations." *Id.* In particular, the defendant asked our Court to determine whether he "voluntarily consented to a search that resulted in the discovery of incriminating evidence." *Id.* at 270, 814 S.E.2d at 83. We held that the officer unconstitutionally extended the traffic stop, and that, even if the officer had not done so, the "defendant's consent to the search of his person was not valid." *Id.* at 268, 814 S.E.2d at 82.

After allowing the State's petition for discretionary review, our Supreme Court reversed the decision of this Court. In doing so, our Supreme Court held that the "defendant's Fourth Amendment claims [we]re not reviewable on direct appeal, *even for plain error*, because he completely waived them by not moving to suppress evidence of the cocaine before or at trial." *Id.* at 267, 814 S.E.2d at 82 (emphasis added). The *Miller* Court further explained that, by failing to "file a motion to suppress evidence of the cocaine in question, [the defendant] deprived our appellate courts of the record needed to conduct plain error review. By doing so, he completely waived appellate review of his Fourth Amendment claims." *Id.* at 273, 814 S.E.2d at 85.

The *Miller* Court reasoned that "a defendant cannot move to suppress for the first time *after* trial[.]" which he does "[b]y raising his Fourth Amendment arguments for the first time on appeal[.]" *Id.* at 269, 814 S.E.2d at 83. Additionally,

Defendant fail[ed] to distinguish between cases like his, on the one hand, and cases in which a defendant has moved to suppress and both sides have fully litigated the suppression issue at the trial court stage, on the other. When a case falls into the latter category but the suppression issue is not preserved for some other reason, our appellate courts may still conduct plain error review.

*Id.* at 272, 814 S.E.2d at 85. "But when a defendant, such as [the] defendant here, does *not* file a motion to suppress at the trial court stage, the evidentiary record pertaining to his suppression arguments has not been fully developed, and may not have been developed at all." *Id.* at 269, 814 S.E.2d at 83. "Without a fully developed record, an appellate court simply lacks the information necessary to assess the merits of a defendant's plain error arguments." *Id.* at 270, 814 S.E.2d at 83-84.

These same principles apply to the case at bar. Here, as in *Miller*, Defendant raises a fact-intensive Fourth Amendment issue for the first



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time on appeal. Defendant was arrested after law enforcement officers searched the truck and found 90 hydrocodone tablets. Prior to executing the search, Detective Skiver requested—and Defendant provided—Defendant’s consent to search the truck. Although Defendant now contends on appeal that the detectives’ earlier retrieval of his firearm from the truck invalidated his consent, this question is not properly before us. Defendant did not move to suppress evidence of the hydrocodone tablets prior to or during his trial. Thus, the issue was not “fully litigated” by “both sides” at the trial court stage, and the appellate record is therefore insufficient to review his claim. *Id.* at 272, 814 S.E.2d at 85.

As *Miller* clearly reiterates, a motion to suppress was the “exclusive method” by which Defendant could contest the admissibility of such evidence on constitutional grounds. N.C. Gen. Stat. § 15A-979(d). Yet, as in *Miller*, Defendant impermissibly “move[s] to suppress for the first time after trial” by “raising his Fourth Amendment arguments for the first time on appeal.” *Miller*, 371 N.C. at 269, 814 S.E.2d at 83 (emphasis omitted).

Because Defendant never moved to suppress evidence of the hydrocodone tablets, there was no suppression hearing, and we therefore lack the fully developed record necessary to conduct plain error review. Consequently, we conclude that Defendant has completely waived appellate review of his Fourth Amendment claim. *See id.* at 273, 814 S.E.2d at 85. Accordingly, we dismiss Defendant’s challenge to the judgments entered upon his convictions for trafficking in opium or heroin by possessing and transporting 28 grams or more.

II. Civil Judgments

[2] On 10 September 2019, Defendant filed a petition for writ of certiorari, seeking review of the two civil judgments entered against Defendant by the trial court. Defendant maintains, and the State concedes, that the trial court improperly imposed attorney’s fees and an attorney-appointment fee against Defendant without providing him with notice and an opportunity to be heard, as required by N.C. Gen. Stat. § 7A-455. We agree.

“A convicted defendant is entitled to notice and an opportunity to be heard before a valid judgment for costs can be entered.” *State v. Webb*, 358 N.C. 92, 101, 591 S.E.2d 505, 513 (2004) (citation omitted). Prior to “entering money judgments against indigent defendants for fees imposed by their court-appointed counsel under N.C. Gen. Stat. § 7A-455,” trial courts must “ask defendants—personally, not through counsel—whether they wish to be heard on the issue.” *State v. Friend*,

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257 N.C. App. 516, 523, 809 S.E.2d 902, 907 (2018). If the trial court does not conduct a colloquy directly with the defendant on this issue, then “the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard.” *Id.*

“Accordingly, we vacate the civil judgment for attorney[’s] fees under N.C. Gen. Stat. § 7A-455 and remand to the trial court for further proceedings on this issue.” *Id.* “On remand, the State may apply for a judgment in accordance with N.C. Gen. Stat. § 7A-455, provided that [D]efendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed by the court-appointed attorney.” *State v. Jacobs*, 172 N.C. App. 220, 236, 616 S.E.2d 306, 317 (2005).

Further, “[b]ecause Defendant was not given notice of the appointment fee and an opportunity to object to the imposition of the fee at his sentencing hearing, the appointment fee is also vacated without prejudice to the State again seeking [an] appointment fee on remand.” *State v. Harris*, 255 N.C. App. 653, 664, 805 S.E.2d 729, 737 (2017).

**Conclusion**

For the reasons stated herein, we hold that Defendant waived appellate review of his arguments concerning the hydrocodone tablets’ allegedly erroneous admission into evidence. Furthermore, we vacate the civil judgments imposing attorney’s fees and the attorney-appointment fee, and remand for further proceedings in accordance with this opinion.

DISMISSED IN PART; VACATED IN PART AND REMANDED.

Judges BERGER and YOUNG concur.

**STATE v. REAVES-SMITH**

[271 N.C. App. 337 (2020)]

STATE OF NORTH CAROLINA

v.

DEVANTEE MARQUISE REAVES-SMITH, DEFENDANT

No. COA19-932

Filed 5 May 2020

**1. Identification of Defendants—out-of-court identification—pre-trial show-up—immediate display of suspect—Eyewitness Identification Reform Act—motion to suppress**

In an attempted robbery prosecution, the trial court did not err in denying defendant's motion to suppress an out-of-court identification where two men attempted to rob the victim and fired a gun, the victim gave a detailed description of the men to a policeman who was nearby and heard the gunshot, defendant was seen 800 feet from the crime scene seven minutes after the officer broadcast their descriptions and was apprehended shortly thereafter, and the victim identified him as one of the robbers and the person who fired the gun. The trial court's findings of fact and conclusions of law—supported by the evidence—showed that the immediate display of defendant, an armed and violent suspect, was required by the circumstances and the show-up complied with the Eyewitness Identification Reform Act.

**2. Identification of Defendants—out-of-court identification—pre-trial show-up—eyewitness confidence statement—victim's vision information—motion to suppress**

In an attempted armed robbery prosecution, the trial court did not err when, in denying defendant's motion to suppress an out-of-court identification, it failed to make findings regarding the police officer's failure to obtain a confidence statement from the victim and failure to obtain information about the victim's vision because they were not requirements for show-up identifications under N.C.G.S. § 15A-284.52(c1) (the Eyewitness Identification Reform Act).

**3. Identification of Defendants—out-of-court identification—pre-trial show-up—impermissibly suggestive—likelihood of misidentification—motion to suppress**

In an attempted robbery prosecution where the victim had the opportunity to view the defendant during the crime and provided detailed descriptions of the two suspects to police, within seven minutes the suspects were seen 800 feet from the crime scene, and

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[271 N.C. App. 337 (2020)]

fourteen minutes after the attempted robbery the victim identified defendant as the person who shot at him, the pre-trial show-up identification of defendant was not impermissibly suggestive, it did not create a substantial likelihood of misidentification, and the trial court did not err in denying defendant's motion to suppress the out-of-court identification.

**4. Criminal Law—jury instructions—reliability of eyewitness identifications—non-compliance with Eyewitness Identification Reform Act**

In a prosecution for attempted robbery, the trial court's failure to instruct the jury that it could consider non-compliance with the Eyewitness Identification Reform Act in determining the reliability of the eyewitness identification was not plain error because the alleged non-compliance, the officer's failure to obtain an eyewitness confidence level statement, was not required by N.C.G.S. § 15A-284.52(c1).

Appeal by defendant from judgment entered 28 March 2019 by Judge Karen Eady-Williams in Mecklenburg County Superior Court. Heard in the Court of Appeals 15 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Michael E. Bulleri, for the State.*

*W. Michael Spivey for defendant-appellant.*

BERGER, Judge.

On March 28, 2019, a Mecklenburg County jury convicted Devantee Marquise Reaves-Smith ("Defendant") of attempted robbery with a dangerous weapon. Defendant appeals, arguing the trial court erred when it (1) denied his motion to suppress evidence of a show-up identification, and (2) failed to instruct the jury about purported noncompliance with the North Carolina Eyewitness Identification Reform Act (the "Act"). We disagree.

**Factual and Procedural Background**

On December 16, 2016, two men attempted to rob Francisco Alejandro Rodriguez-Baca (the "victim") in a McDonald's restaurant parking lot. The victim did not give the men any money, but instead offered to buy them something to eat. One of the suspects, armed with a revolver, fired a shot in the air, and the two perpetrators fled the scene

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on foot. The victim ran to a nearby parking lot. There, he found Officer Jon Carroll (“Officer Carroll”) and told him what had just occurred.

The victim described the man armed with the revolver as a “slim African-American male” who was wearing a grayish sweatshirt, a black mask, a backpack, and gold-rimmed glasses. The victim later identified Defendant as the individual armed with the revolver.

Officer Carroll testified that he had heard a gunshot just before the victim approached him. According to Officer Carroll, the victim described the suspects as: “two black males, approximately five-foot ten-inches in height . . . both had grayish colored hoodies, . . . had book bags, face mask[s] and gold-rimmed glasses.” Officer Carroll relayed this description to law enforcement officers over the radio. The victim stayed with Officer Carroll while other officers searched for the suspects.

Approximately seven minutes later, Officer Rodrigo Pupo (“Officer Pupo”) spotted “two black males . . . . One of them had a grey hoodie. The other one had a black hoodie . . . they were both wearing backpacks” leaving a Bojangles restaurant. Officer Pupo reported the sighting over the radio. As another officer arrived at the restaurant, Defendant fled the area on foot. Defendant was apprehended a short time later wearing a black ski mask, and he had 80 .22-caliber bullets inside his backpack. The other suspect was not apprehended at the time. Defendant later identified Koran Hicks as his accomplice.

Officer Carroll transported the victim to Defendant’s location to conduct a show-up identification. Officer Jones testified that the show-up was conducted around dusk and the spotlights from Officer Carroll’s vehicle were activated. The victim identified Defendant as the assailant with the gun. Officer Jones’ body camera recorded the identification.

On January 3, 2017, Defendant was indicted for attempted robbery with a dangerous weapon. On October 2, 2018, Defendant filed a motion to suppress the in-court and out-of-court identifications by the victim. The trial court denied Defendant’s motion regarding the out-of-court identification, and reserved ruling on the in-court identification for the trial judge. At trial, the jury found Defendant guilty of attempted robbery with a dangerous weapon.

Defendant appeals, alleging the trial court erred when it (1) denied his motion to suppress evidence of the show-up identification, and (2) failed to instruct the jury concerning purported noncompliance with the Act. We disagree.

**STATE v. REAVES-SMITH**

[271 N.C. App. 337 (2020)]

Analysis**I. Motion to Suppress**

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

**A. Compliance with the Act**

**[1]** A show-up is "[a] procedure in which an eyewitness is presented with a single live suspect for the purpose of determining whether the eyewitness is able to identify the perpetrator of a crime." N.C. Gen. Stat. § 15A-284.52(a)(8) (2019). The purpose of a show-up is to serve as "a much less restrictive means of determining, at the earliest stages of the investigation process, whether a suspect is indeed the perpetrator of a crime, allowing an innocent person to be released with little delay and with minimal involvement with the criminal justice system." *State v. Rawls*, 207 N.C. App. 415, 422, 700 S.E.2d 112, 117 (2010) (*purgandum*). A show-up is just one identification method that law enforcement may use "to help solve crime, convict the guilty, and exonerate the innocent." N.C. Gen. Stat. § 15A-284.51 (2019).

To comply with the requirements set forth by the General Assembly, a show-up must meet the following requirements:

(1) A show-up may only be conducted when a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness.

(2) A show-up shall only be performed using a live suspect and shall not be conducted with a photograph.

(3) Investigators shall photograph a suspect at the time and place of the show-up to preserve a record of the appearance of the suspect at the time of the show-up procedure.

N.C. Gen. Stat. § 15A-284.52(c1) (omitting requirements for juvenile offenders).

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Defendant contends that “the trial court did not make any findings of circumstances that required an immediate display of [Defendant] to the witness.” The trial court’s findings of fact, which were each supported by competent evidence, are set forth below:

1. On December 16th, 2016 Charlotte Mecklenburg Police Department Officer J.J. Carroll heard a loud pop that he (*sic*) believed was a gun shot while he was sitting in his patrol vehicle.
2. Within a few moments, Mr. Francisco Rodriguez-Baca approached Officer Carroll and told him he was just robbed by two black males. Both males were about 5’ 10”, wearing grey colored hoodies, black masks, both had book bags, and both were wearing glasses.
3. Mr. Francisco Rodriguez-Baca had a brief conversation with the suspects. As such, the victim had an opportunity to view the suspects.
4. Mr. Francisco Rodriguez-Baca stated that one of the suspects fired a shot and then fled off on foot towards South Boulevard.
5. Officer Carroll put out a “be on the lookout” (BOLO) request over the radio, giving the description of the suspects.
6. Within seven minutes of the BOLO, two suspects were seen at a nearby Bo Jangles (*sic*) restaurant. The two suspects matched the description given by the victim in every way, except for the glasses.
7. Officers attempted to detain the suspects, but they fled on foot.
8. A nine minute foot chase ensued by officers. Sgt. Adam Jones of the Charlotte Mecklenburg Police Department was able to detain one of the suspects, later identified as the Defendant.
9. The Defendant was detained less than 1/2 of a mile from the site of the robbery.
10. Sgt. Jones placed the Defendant in handcuffs for the purposes of detention.
11. Ofc. Carroll drove Mr. Francisco Rodriguez-Baca to the Defendant’s location in order to do a show-up.

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12. Mr. Francisco Rodriguez-Baca was inside a police vehicle with Officer Carroll, while Sgt. Jones escorted the defendant in front of the police vehicle. It was dark out when the show-up was conducted, however the vehicles headlights were used for illumination.

13. The Defendant was approximately 15 yards from the front of the vehicle. The Defendant was in handcuffs, being held by the arm of a uniformed police officer, and standing in front of a marked police cruiser.

14. Mr. Francisco Rodriguez-Baca identified the Defendant as one of the suspects, and indicated he was the shooter. He did not say how confident he was in his identification.

15. The show-up identification procedure was recorded on body-worn camera (BWC) by Sgt. Adam Jones.

16. The show-up identification procedure was done close in time to the robbery and was no more than 30 minutes after it occurred.

17. As a result of the identification the Defendant was charged with attempted robbery with a dangerous weapon, conspiracy, assault with a deadly weapon, resisting a public officer, possession of a schedule IV controlled substance, and possession of marijuana paraphernalia.

These findings established that Defendant and an accomplice were suspected of a violent crime that included the discharge of a firearm. Defendant matched the description provided by the victim, and he fled when officers attempted to detain him. Defendant's actions forced officers to pursue him on foot for more than nine minutes. As the trial court noted, "given the nature of the crime, [and] the efforts on the part of [Defendant] to flee[.]" the circumstances required immediate display of Defendant. Because an armed suspect, who is not detained, poses an imminent threat to the public, the trial court's findings supported immediate display of Defendant to the victim. *See, e.g., State v. Guy*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 822 S.E.2d 66, 72 (2018) ("Even though the suspects had already fled [the crime scene], there was still an ongoing emergency that posed danger to the public."). Moreover, had the victim determined that Defendant was not the perpetrator, officers could have immediately released Defendant and continued their search for the suspects. Thus, the officers' actions in conducting the show-up identification



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were consistent with the purpose of the Act, *i.e.*, “solve crime, convict the guilty, and exonerate the innocent.” N.C. Gen. Stat. § 15A-284.51.

Based on the findings of fact set forth above, the trial court made the following conclusions of law:

1. The show-up conducted in this case complied with the North Carolina Eyewitness Identification Reform Act, G.S. 284.52.
2. The Defendant matched the description given by the victim . . . .
3. The Defendant was located in close in time and proximity to the robbery.
4. The show-up was done with a live suspect.

Although conclusions 2, 3, and 4 contain mixed findings of fact and conclusions of law, “we do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion.” *State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758 (2016) (citation omitted). Here, the trial court’s conclusion of law that the officers complied with the Act is supported by competent evidence. Defendant matched the victim’s description. Defendant was located at a Bojangles restaurant less than 800 feet away from the McDonalds restaurant parking lot within a few minutes of a BOLO being issued. The show-up identification was conducted with a live person which was recorded on the officers’ body cameras. In addition, the nature and circumstances surrounding apprehending an armed, violent suspect required officers to immediately display Defendant. Thus, the trial court’s findings of fact support its conclusion of law. Accordingly, the show up conducted here satisfied the requirements of the Act.

**B. Eyewitness Confidence Statement**

**[2]** Defendant also argues that the trial court failed to make findings of fact about Officer Carroll’s failure to obtain a confidence statement and information related to the victim’s vision pursuant to N.C. Gen. Stat. Section 15A-284.52(c2)(2).

“[T]his Court’s duty is to carry out the intent of the legislature. As a cardinal principle of statutory interpretation, if the language of the statute is clear and is not ambiguous, we must conclude that the legislature intended the statute to be implemented according to the plain meaning of its terms.” *State v. Crooms*, 261 N.C. App. 230, 234, 819 S.E.2d 405, 407 (2018) (citation and quotation marks omitted).

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Section 15A-284.52(c2) states that

The North Carolina Criminal Justice Education and Training Standards Commission shall develop a policy regarding standard procedures for the conduct of show-ups in accordance with this section. The policy shall apply to all law enforcement agencies and shall address all of the following, in addition to the provisions of this section:

- (1) Standard instructions for eyewitnesses.
- (2) Confidence statements by the eyewitness, including information related to the eyewitness' vision, the circumstances of the events witnessed, and communications with other eyewitnesses, if any.
- (3) Training of law enforcement officers specific to conducting show-ups.
- (4) Any other matters deemed appropriate by the Commission.

N.C. Gen. Stat. § 15A-284.52(c2).

In North Carolina, policies established by State agencies are “*nonbinding* interpretive statement[s] . . . used purely to assist a person to comply with the law, such as a guidance document.” N.C. Gen. Stat. § 150B-2(7a) (2019) (emphasis added). “When a term has long-standing legal significance, it is presumed that legislators intended the same significance to attach by use of that term, absent indications to the contrary.” *State v. Fletcher*, 370 N.C. 313, 329, 807 S.E.2d 528, 540 (2017) (citation and quotation marks omitted). There is no indication that the legislature’s use of the term “policy” in Section 15A-284.52(c2) was intended to have any other significance or meaning. In fact, the delegation of authority to establish other policies the agency deemed appropriate is a clear indication that the guidelines established pursuant to Section 15A-284.52(c2) were just that: guidelines.

Statutes are binding acts of the General Assembly. By definition, policies from State agencies are nonbinding guidelines. The plain language of the statute shows that the legislature delegated authority to the North Carolina Criminal Justice Education and Training Standards Commission to establish nonbinding guidelines to assist law enforcement. Because the language of Section 15A-284.52(c2) does not place additional statutory requirements on law enforcement, but rather requires the North Carolina Criminal Justice Education and

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Training Standards Commission to develop nonbinding guidelines, only Section 15A-284.52(c1) sets forth the requirements for show-up identification compliance.

C. Impermissibly Suggestive or Likelihood of Misidentification

[3] Next, Defendant claims that the trial court's findings of fact did not support its conclusion of law that the show-up was not "impermissibly suggestive or created a substantial likelihood of misidentification."

Our Courts have previously held that show-up identifications "may be inherently suggestive for the reason that witnesses would be likely to assume that the police presented for their view persons who were suspected of being guilty of the offense under investigation." *State v. Turner*, 305 N.C. 356, 364, 289 S.E.2d 368, 373 (1982) (citations omitted). However, "[p]retrial show-up identifications . . . , even though suggestive and unnecessary, are not *per se* violative of a defendant's due process rights. The primary evil sought to be avoided is the substantial likelihood of irreparable misidentification." *Id.* at 364, 289 S.E.2d at 373 (citations omitted).

This Court applies a two-step process to determine "whether identification procedures violate due process." *State v. Malone*, 256 N.C. App. 275, 290, 807 S.E.2d 639, 650 (2017) (citation and quotation marks omitted), *aff'd in part, rev'd in part*, 373 N.C. 134, 833 S.E.2d 779 (2019). First, we must determine "whether an impermissibly suggestive procedure was used in obtaining the out-of-court identification." *Id.* at 290, 807 S.E.2d at 650 (citation omitted). Second, if we determine that the identification procedures were impermissibly suggestive, we must then determine "whether, under all the circumstances, the suggestive procedures employed gave rise to a substantial likelihood of irreparable misidentification." *Id.* at 290, 807 S.E.2d at 650 (citation omitted). This inquiry "depends upon whether under the totality of circumstances surrounding the crime itself the identification possesses sufficient aspects of reliability." *State v. Richardson*, 328 N.C. 505, 510, 402 S.E.2d 401, 404 (1991) (citation and quotation marks omitted). The central question is whether under the totality of the circumstances the identification was reliable even if the confrontation procedure was suggestive. *State v. Oliver*, 302 N.C. 28, 45-46, 274 S.E.2d 183, 195 (1981).

To determine the reliability of a pre-trial identification, this Court considers the following factors:

- (1) the witness's opportunity to view the criminal at the time of the crime;
- (2) the witness's degree of attention;

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(3) the accuracy of the witness's prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation.

*State v. Gamble*, 243 N.C. App. 414, 420, 777 S.E.2d 158, 163 (2015) (citations omitted).

The show-up identification proceeding at issue here did not violate Defendant's due process rights as it was not impermissibly suggestive, nor did it create a substantial likelihood of misidentification.

The evidence presented at the motion to suppress hearing satisfies the reliability factors in *Gamble*. The victim had the opportunity to view Defendant during the robbery and provided a detailed description of the suspects to Officer Carroll as two black males "approximately fifteen in height wearing gray-colored hoodies" with "book bags, a black-colored mask or some type of covering over their face" and "both were wearing glasses."

The description enabled officers to identify the two suspects "seven minutes later" about "800 feet" from the original crime scene. The victim immediately recognized Defendant as "one of the suspects" and that he was the "guy who shot at him." Finally, the victim identified Defendant as the individual with the revolver approximately "fourteen minutes" from the time he heard the gunshot to the time of the show-up identification.

Therefore, the trial court did not err in concluding that the show-up was not "impermissibly suggestive or [that it] created a substantial likelihood of misidentification."

## II. Jury Instructions

**[4]** Defendant concedes that he failed to object to the jury instructions and that he did not request an instruction concerning compliance or noncompliance with the Act. However, Defendant argues that the trial court committed plain error by not instructing the jury that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications. We disagree.

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's

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finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 334 (2012) (*purgandum*).

“In instructing the jury, it is well settled that the trial court has the duty to declare and explain the law arising on the evidence relating to each substantial feature of the case.” *State v. Scaturro*, 253 N.C. App. 828, 835, 802 S.E.2d 500, 506 (2017) (*purgandum*).

Section 15A-284.52(d) provides various remedies “as consequences of compliance or noncompliance with the requirements of” Section 15A-284.52. N.C. Gen. Stat. § 15A-284.52(d). Section 15A-284.52(d)(3) provides that “[w]hen evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications.” N.C. Gen. Stat. § 15A-284.52(d)(3).

Defendant argues that he was entitled to jury instructions under Section 15A-284.52(d)(3) because Officer Carroll did not obtain an eyewitness confidence level under Section 15A-284.52(c2)(2). However, Section 15A-284.52(d)(3) specifically limits remedies for “compliance or noncompliance *with the requirements of this section*.” N.C. Gen. Stat. § 15A-284.52(d)(3) (emphasis added). As set forth above, Section 15A-284.52(c2) concerns policies and guidelines established by the North Carolina Criminal Justice and Training Standards Commission, it does not establish the requirements for show-up identifications. Those requirements are specifically enumerated in subsection (c1). Thus, because officers complied with the show-up procedures in Section 15A-284.52(c1), Defendant was not entitled to a jury instruction on non-compliance with the Act.

### Conclusion

For the reasons stated herein, Defendant received a fair trial free of error.

NO ERROR.

Judges TYSON and COLLINS concur.

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STATE OF NORTH CAROLINA

v.

JOHNATHAN RICKS, DEFENDANT

No. COA19-836

Filed 5 May 2020

**1. Criminal Law—prosecutor’s closing arguments—not prejudicial—overwhelming evidence of guilt**

On appeal from convictions for statutory rape and other sexual offenses against children, where defendant challenged multiple statements the prosecutor made during closing arguments and where each statement was subject to different standards of appellate review (depending on whether defendant objected to the statement at trial and whether the statement potentially infringed upon his constitutional rights), the Court of Appeals held that none of the prosecutor’s remarks prejudiced defendant—regardless of the applicable standard of review—in light of the overwhelming evidence of his guilt, including the victims’ testimony, corroborative testimony by the victims’ family members, and DNA evidence linking defendant to the crimes.

**2. Appeal and Error—satellite-based monitoring order—no objection—Rule 2—consideration of factors**

Where defendant failed to preserve for appellate review his constitutional challenge to an order imposing lifetime satellite-based monitoring (SBM) upon his release from prison, the Court of Appeals allowed his petition for certiorari and invoked Appellate Rule 2 to reach the merits of his argument after weighing the factors described in *State v. Bursell*, 372 N.C. 196 (2019), including the substantial right implicated by the imposition of SBM (defendant’s Fourth Amendment rights), the factual bases underlying the charges against defendant (he was convicted of statutory rape and other sexual offenses for having sex with two twelve-year-old girls when he was twenty-one years old), and the trial court’s decision to impose SBM without receiving any argument from the parties or evidence from the State.

**3. Satellite-Based Monitoring—lifetime monitoring—constitutionality as applied—reasonable search—hearing required**

After defendant’s convictions for statutory rape and other sexual offenses against children, the trial court erred during sentencing by imposing lifetime satellite-based monitoring (SBM) upon

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defendant's release from prison, where the court failed to conduct a hearing—as required by *State v. Grady*, 372 N.C. 509 (2019)—to determine whether lifetime SBM constituted a reasonable search under the Fourth Amendment of the federal and state constitutions. Thus, the order imposing lifetime SBM was unconstitutional as applied to defendant and was vacated without prejudice to the State's ability to file a new SBM application.

Judge TYSON concurring in the result in part and dissenting in part.

Appeal by Defendant from judgment and order entered 17 January 2019 by Judge Claire V. Hill in Harnett County Superior Court. Heard in the Court of Appeals 1 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Elizabeth J. Weese, for the State.*

*Kimberly P. Hoppin for Defendant.*

BROOK, Judge.

Johnathan Ricks (“Defendant”) appeals from judgment entered upon jury verdicts finding him guilty of three counts of statutory rape of a child, two counts of statutory sex offense with a child, and three counts of taking indecent liberties with a child. Defendant also petitions for a writ of certiorari to review the trial court's order imposing lifetime satellite-based monitoring (“SBM”) upon his release from prison. He argues that the trial court's imposition of SBM violates his rights under the Fourth Amendment to the United States Constitution and the North Carolina Constitution.

## I. Background

### A. Factual Background

N.M. and her cousin J.C. both turned 12 years old in February of 2016. Also in February of 2016, N.M. and J.C. met Defendant while attending a sleepover with their cousins at J.C.'s sister's house. Defendant and N.M.'s sister had gone to school together; N.M.'s sister was 21 years old. Defendant drove to N.M.'s sister's house and told N.M. and J.C. via Kik, a texting app, to come outside. Around 2:00 or 3:00 a.m. on some day in February 2016, N.M. and J.C. went outside, got into Defendant's car, and then N.M. and Defendant had oral and vaginal sex in the car while J.C. stood outside. Then J.C. got in the car and had vaginal sex with

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Defendant in the back seat while N.M. sat in the front seat. Defendant had vaginal sex with N.M. again, and then J.C. and N.M. both performed oral sex on Defendant. Defendant drove the cousins back to N.M.'s sister's house and they went to sleep.

N.M. and Defendant continued communicating via Kik until August of 2016. Around midnight on 14 August 2016, Defendant told N.M. via Kik to go outside of her house; she did. Defendant was driving a gray Chevrolet Malibu, and N.M. got into the car and went with him to his house down the road. Defendant asked her to perform oral sex on him, which she did, and then they had vaginal sex in the car. They then went inside his house and had vaginal sex in his bedroom. Defendant drove N.M. home, and, when she got out of his car around 3:30 a.m., her brother was standing in the yard. N.M.'s brother had known Defendant for about five years and recognized Defendant's car, although he did not see Defendant in the car. N.M.'s brother went inside, woke up their mother, and walked down to Defendant's house to confront him. N.M.'s mother called the police, who arrived about 20 minutes later.

N.M.'s mother took N.M. to the hospital where hospital personnel collected a rape kit, her clothing, vaginal swabs, and pubic hair combings. A sexual assault nurse examiner also interviewed N.M. J.C.'s mother also spoke with law enforcement and a doctor after learning of Defendant's sexual activity with N.M. and J.C. J.C. told her mother that the sexual activity with Defendant had been occurring since February of 2016.

Defendant met voluntarily with law enforcement and provided a DNA sample. He also confirmed that he was born in 1995. Microscopic examinations of N.M.'s vaginal swabs revealed the presence of sperm, and DNA analysis of the swabs revealed that the sperm fraction matched the profile obtained from Defendant.

**B. Procedural History**

Defendant was indicted by a Harnett County grand jury for three counts of statutory rape of a child by an adult, three counts of statutory sex offense with a child by an adult, three counts of first-degree kidnapping, and three counts of taking indecent liberties with a child. He was tried before a jury during the 14 January 2019 session of criminal Superior Court of Harnett County before Judge Hill. Both juvenile victims testified regarding the sexual encounters with Defendant. J.C.'s mother and N.M.'s brother also testified, corroborating the victims' testimony. The State also presented testimony from a state forensic scientist, who had compared Defendant's DNA sample with the DNA collected



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from N.M.'s rape kit. She testified that Defendant's DNA matched the DNA sample, and that the probability of a random match "is approximately . . . one in 9.42 nonillion in the African-American population." Defendant did not testify.

At the close of the State's evidence, Defendant moved to dismiss the three kidnapping charges, and the trial court granted the motion. The jury returned verdicts of guilty to three counts of statutory rape of a child by an adult, two counts of statutory sex offense with a child, and three counts of indecent liberties with a child. The trial court consolidated the offenses and entered judgment on 17 January 2019, sentencing Defendant to a mandatory term of 300 to 420 months of active imprisonment.

The trial court then ordered Defendant to register as a sex offender for his natural life and enroll in SBM for his natural life based on the convictions for statutory rape and sex offense with a child. Based on the convictions for indecent liberties with a child, the trial court ordered Defendant to register as a sex offender for 30 years and ordered that the Division of Adult Corrections perform a risk assessment for a determination of SBM.

Defendant entered notice of appeal in open court on 17 January 2019.

**II. Jurisdiction**

Appeal from a final judgment of a superior court lies of right with this Court. N.C. Gen. Stat. § 7A-27(b)(1) (2019); *id.* § 15A-1444(a) (2019).

Defendant failed to properly notice appeal from the imposition of SBM under North Carolina Rules of Appellate Procedure, Rule 3. *See State v. Brooks*, 204 N.C. App. 193, 195, 693 S.E.2d 204, 206 (2010) (requiring written notice of appeal filed under N.C. R. App. P. 3 for review of SBM orders). Defendant filed a petition for a writ of certiorari contemporaneously with his appellate brief, seeking review of the order imposing lifetime enrollment in SBM. We consider his petition *infra* part III.B.

**III. Analysis**

Defendant contends that the State made improper closing arguments that unfairly and unconstitutionally prejudiced him. Defendant further contends that the trial court erred in imposing lifetime SBM because the State failed to establish that SBM constitutes a reasonable search under the Fourth Amendment. We review each argument in turn.

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## A. Closing Arguments

## i. Standard of Review

Our standard of review of an allegedly improper closing argument depends on whether a defendant timely objected to such remarks.

Generally, where a defendant objects to improper remarks, we review “whether the trial court abused its discretion by failing to sustain the objection.” *State v. Jones*, 355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002). “In order to assess whether a trial court has abused its discretion when deciding a particular matter, this Court must determine if the ruling could not have been the result of a reasoned decision.” *Id.* (internal marks and citation omitted). Even if this is the case, a defendant only receives relief if the challenged “remarks were of such a magnitude that their inclusion prejudiced defendant[.]” *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364 (2003) (citation omitted).

Where a defendant has failed to object to an allegedly improper remark, we review “whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*.” *Jones*, 355 N.C. at 133, 558 S.E.2d at 107.

In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

*Id.* To establish that a remark merited intervention *ex mero motu*, a “defendant must show that the prosecutor’s comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.” *State v. Grooms*, 353 N.C. 50, 81, 540 S.E.2d 713, 732 (2000) (citation omitted).

Our review differs, however, where an improper remark infringes on a criminal defendant’s constitutional rights. *State v. Kemmerlin*, 356 N.C. 446, 482, 573 S.E.2d 870, 894 (2002). In such circumstances, the State must show that the error was harmless beyond a reasonable doubt. *Id.* (reviewing for harmless error a prosecutor’s comment on a criminal defendant’s Sixth Amendment right to a jury trial).

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## ii. Merits

[1] Defendant takes issue with several remarks made by the prosecutor; we review each claim in turn.

Defendant first claims that the prosecutor improperly commented on Defendant's exercise of his Fifth Amendment right to not incriminate himself. The prosecutor stated: "If [defense counsel] had some evidence that would present a defense for his client, have no doubt he would have presented that to you." Defense counsel objected to this statement, and the trial court sustained the objection, struck the statement from the record, and instructed the jury to disregard it. Immediately thereafter, the prosecutor said, "Put it this way. If they had a witness or a piece of evidence that contradicted what you heard[,] and defense counsel objected. The trial court sustained the objection. The prosecutor then said, "You cannot consider what you did not hear." Defense counsel objected, and the trial court overruled the objection. The prosecutor went on to say,

You cannot speculate about what people that did not come into court and did not put their hand on the Bible and did not swear to tell you the truth might have said. The evidence you're to consider is what the people on the witness stand said or did not say and what the evidence you heard was, and that's it. That's the evidence that you are to consider in this case. I cannot satisfy an unreasonable doubt.

Defense counsel did not object to these statements.

"A criminal defendant may not be compelled to testify, and any reference by the State regarding his failure to testify is violative of his constitutional right to remain silent." *State v. Larry*, 345 N.C. 497, 524, 481 S.E.2d 907, 922-23 (1997), *cert. denied*, 522 U.S. 917, 118 S. Ct. 304, 139 L. Ed. 2d 234 (1997) (citation omitted). "[A] prosecutor violates this rule if the language used was manifestly intended to be, or was of such character that the jury would naturally and necessarily take it to be, a comment on the failure of the accused to testify." *State v. Barrett*, 343 N.C. 164, 178, 469 S.E.2d 888, 896 (1996) (internal marks and citation omitted). We look at "the argument in the context in which it was given and in light of the overall factual circumstances to which it refers." *Id.* at 179, 469 S.E.2d at 896. "The error may be cured by a withdrawal of the remark or by a statement from the court that it was improper, followed by an instruction to the jury not to consider the failure of the accused to offer himself as a witness." *State v. McCall*, 286 N.C. 472, 487, 212 S.E.2d 132, 141 (1975). "[T]he sustaining of [an] objection advise[s] the jurors

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that they should not consider the statement.” *Larry*, 345 N.C. at 527, 481 S.E.2d at 924. “The trial court’s failure to give a curative instruction after the State’s comment on an accused’s failure to testify does not call for an automatic reversal[] but requires this Court to determine if the error is harmless beyond a reasonable doubt.” *Id.* at 524, 481 S.E.2d at 923.

However,

[i]t is well established that although the defendant’s failure to take the stand and deny the charges against him may not be the subject of comment, the defendant’s failure to produce exculpatory evidence or to contradict evidence presented by the State may properly be brought to the jury’s attention by the State in its closing argument.

*State v. Taylor*, 337 N.C. 597, 613, 447 S.E.2d 360, 370 (1994). Pointing out to the jury that a defendant has not exercised his or her rights to call witnesses or produce evidence to refute the state’s case, for example, does not amount to gross impropriety. *State v. Mason*, 315 N.C. 724, 733, 340 S.E.2d 430, 436 (1986).

Assuming without deciding that they referred to Defendant’s exercise of his Fifth Amendment right not to testify, we conclude that the prosecutor’s arguments to the jury that they “cannot consider what they did not hear” and could not “speculate about what people that did not come into court and did not put their hand on the Bible and did not swear to tell you the truth might have said” was harmless beyond a reasonable doubt given the overwhelming evidence presented of Defendant’s guilt.

Defendant next contests the portion of the prosecutor’s closing argument wherein he said, in reference to the juvenile victims’ testimony, the following: “Adults have to bring them into court and ask them to tell a roomful of strangers about these sexual acts to try and prevent them from occurring in the future to others.” The trial court overruled Defendant’s objection to this comment. Defendant contends that this comment impermissibly (1) criticizes Defendant’s exercising his right to a jury trial instead of pleading guilty, and (2) suggests that the juvenile victims had to testify to prevent Defendant from committing further crimes in the future.

“[A] criminal defendant has a constitutional right to plead not guilty and be tried by a jury. Reference by the State to a defendant’s failure to plead guilty violates his constitutional right to a jury trial.” *Larry*, 345 N.C. at 524, 481 S.E.2d at 923 (internal citations omitted). Assuming without deciding that the prosecutor’s comment obliquely refers to Defendant’s right to plead not guilty and be tried by a jury, and in light of

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the overwhelming evidence of guilt presented by the State, we conclude that this error was harmless beyond a reasonable doubt. *Id.* at 526, 481 S.E.2d at 924.

In regard to Defendant's assertion that this comment improperly appealed to the jury's sympathy and prejudice, our Supreme Court has held that specific deterrence arguments in closing argument are not improper. *State v. Syriani*, 333 N.C. 350, 397, 428 S.E.2d 118, 144 (1993) (concluding prosecutor's comment, "He's killed now. The only way to insure he won't kill again is the death penalty[,] was not improper). We conclude that the trial court did not abuse its discretion in overruling Defendant's objection to this comment.

Defendant further takes issue with the following line of argument from the prosecutor:

you can find him guilty of those offenses or you can acquit him like the lawyer's going to ask you to do after I'm done talking. If you do that, you will tell these girls, I didn't believe you. I think you came into court and made these things up.

The trial court sustained Defendant's objection to the above comment. The prosecutor then said, "You will be telling them, I think you falsely accused an innocent man of heinous crimes." The trial court sustained Defendant's objection and instructed the jury not to consider that portion of the argument. The prosecutor then said, "You will be telling them it was their fault." Defendant did not object to this statement; we therefore review it to determine whether the trial court erred in failing to intervene *ex mero motu*.

Defendant contends that this statement "improperly focused the jury's attention on how N.M. and J.C. would interpret a verdict of not guilty rather than more properly focusing the jury's attention on determining whether the State had sufficiently proven the case against Defendant."

Our Supreme Court "has stressed that a jury's decision must be based solely on the evidence presented at trial and the law with respect thereto, and not upon the jury's perceived accountability to the witnesses, to the victim, to the community, or to society in general." *State v. Brown*, 320 N.C. 179, 195-96, 358 S.E.2d 1, 13 (1987). In *Brown*, the prosecutor said:

Please remember something when you go back in the jury room. The 5th of May, 1984, was the most important day in the life of [the victim]'s family, as well as the most

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important day for [the defendant]. . . . The family of the victim has no one to turn to but you. You are the triers of the facts. You are justice today. You are justice.

*Id.* at 195, 358 S.E.2d at 13 (second and third alterations in original). Our Supreme Court admonished the prosecutor, observing that “the remarks in question veer toward a disregard of” the general rule against arguments that cloud “the jury’s focus . . . upon guilt or innocence,” *id.* at 196, 358 S.E.2d at 13 (internal marks and citation omitted), but concluded that “the prosecutor’s remark reminding the jury of the victim’s family’s need for justice” was not so grossly improper as to justify a new trial, *id.*

The prosecutor’s statement here—“You will be telling them it was their fault”—“veer[s] toward a disregard of” the general rule against arguments that cloud “the jury’s focus . . . upon guilt or innocence[.]” *Id.* (internal marks and citation omitted). However, given the evidence of guilt presented at trial, and as our Supreme Court concluded in *Brown*, we conclude that the prosecutor’s statement was not so grossly improper as to justify a new trial.

Defendant next alleges that the prosecutor presented an argument that was “calculated to mislead or prejudice the jury[.]” by telling the jury, “If you saw that statistical number [one in 9.42 nonillion] and thought there was still a chance that’s not the defendant’s DNA found in [N.M.], that’s an unreasonable doubt.” Defendant did not object; we therefore review this statement to determine whether the trial court erred in failing to intervene *ex mero motu*.

Defendant contends that in making this statement, the prosecutor fell into “the prosecutor’s fallacy—that the probability that the DNA at the crime scene came from someone other than the defendant is virtually impossible based on the random match probability.” Defendant cites *McDaniel v. Brown*, 558 U.S. 120, 128, 130 S. Ct. 665, 670, 175 L. Ed. 2d 582, 588 (2010), for the definition of the prosecutor’s fallacy:

The prosecutor’s fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample. . . . In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor’s fallacy. It is further error to

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equate source probability with probability of guilt, unless there is no explanation other than guilt for a person to be the source of crime-scene DNA. This faulty reasoning may result in an erroneous statement that, based on a random match probability of 1 in 10,000, there is a 0.01% chance the defendant is innocent or a 99.99% chance the defendant is guilty.

Defendant contends that the prosecutor's statement encouraged the jury to succumb to the prosecutor's fallacy and therefore was "calculated to mislead" the jury.

At trial, one of the State's testifying forensic scientists testified that DNA collected from N.M.'s rape kit "matches the profile obtained from Jo[h]nathan Ricks." She further testified that the probability of randomly selecting someone from the general population who matched the DNA profile "is approximately . . . one in 9.42 nonillion in the African-American population[.]" Assuming without deciding that the prosecutor's statement improperly conflates "the chance that's not the defendant's DNA found in [N.M.]" with "that statistical number"—the one in 9.42 nonillion chance of a random match—we cannot conclude that the statement "so infected the trial with unfairness that [it] rendered the conviction fundamentally unfair." *Grooms*, 353 N.C. at 81, 540 S.E.2d at 732 (citation omitted).

Finally, Defendant argues that the trial court erred in failing to intervene ex mero motu when the prosecutor said, "The DNA tells the truth. The girls told the truth." Defendant contends that this statement was a "prohibited expression[] of [the prosecutor's] personal opinion about the veracity of evidence and witness credibility."

While "[d]uring a closing argument to the jury an attorney may not . . . express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant," N.C. Gen. Stat. § 15A-1230(a) (2019), "prosecutors are allowed to argue that the State's witnesses are credible[.]" *State v. Augustine*, 359 N.C. 709, 725, 616 S.E.2d 515, 528 (2005), *cert. denied*, 548 U.S. 925, 126 S. Ct. 2980, 165 L. Ed. 2d 988 (2006). Considering the record as a whole, "we cannot conclude that this comment rises to the level of fundamental unfairness given the evidence presented at trial." *State v. Anderson*, 175 N.C. App. 444, 454, 624 S.E.2d 393, 401 (2006).

The State presented the testimony of both juvenile victims, the testimony of the victims' family members that corroborated their testimony, and the testimony of forensic experts that showed that Defendant's DNA matched the sperm collected from N.M.'s rape kit. In light of this



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overwhelming evidence of guilt, we cannot say that the prosecutor's comments prejudiced Defendant regardless of the applicable standard of review.

## B. SBM

Defendant filed a petition for a writ of certiorari contemporaneously with his appellate brief, seeking review of the order imposing lifetime enrollment in SBM. In order for this Court to exercise its discretion to allow a writ, "[a] petition for [a] writ [of certiorari] must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959). For the reasons discussed below, we conclude that Defendant has shown merit, and we allow Defendant's petition to review his claim.

Defendant asserts that the trial court erred in ordering that Defendant enroll in lifetime SBM upon his release from prison because the State failed to meet its burden of proving the imposition of lifetime SBM is a reasonable search under the Fourth Amendment. *See Grady v. North Carolina* ("*Grady I*"), 575 U.S. 306, 310, 135 S. Ct. 1368, 1371, 191 L. Ed. 2d 459, 463 (2015) (per curiam) ("The State's [SBM] program is plainly designed to obtain information. And since it does so by physically intruding on a subject's body, it effects a Fourth Amendment search."). There was no hearing regarding the constitutionality of lifetime SBM here; the trial court imposed lifetime SBM without any argument from the parties or evidence from the State. Defendant did not raise any constitutional challenge or otherwise preserve this constitutional claim at any point during his sentencing hearing. He therefore requests that this Court exercise its discretion to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits.

For the reasons discussed below, we invoke Rule 2 and vacate the trial court's imposition of lifetime SBM.

## i. Rule 2

[2] Our appellate rules require that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1) (2019). Defendant concedes that he did not preserve an objection to the constitutionality of the imposition of lifetime SBM. As a general matter, this failure bars appellate review. *See State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003).



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However, in order

[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, either court of the appellate division may, except as otherwise expressly provided by these rules, suspend or vary the requirements or provisions of any of these rules in a case pending before it upon application of a party or upon its own initiative, and may order proceedings in accordance with its directions.

N.C. R. App. P. 2 (2019). “Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*.” *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis in original) (citation omitted).

“[A] decision to invoke Rule 2 and suspend the appellate rules is always a discretionary determination.” *State v. Bursell* (“*Bursell II*”), 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019) (internal marks and citation omitted). “A court should consider whether invoking Rule 2 is appropriate in light of the specific circumstances of individual cases and parties, such as whether substantial rights of an appellant are affected.” *Id.* at 200, 827 S.E.2d at 305 (internal marks and citation omitted). Because of its discretionary and fact-specific nature, Rule 2 is not applied mechanically. *Campbell*, 369 N.C. at 603, 799 S.E.2d at 603 (“[P]recedent cannot create an automatic right to review via Rule 2.”).

That being said, Justice Newby’s opinion in *Bursell II* is instructive in our exercise of discretion here. *Bursell II* affirmed our Court’s invocation of Rule 2 in *State v. Bursell* (“*Bursell I*”), 258 N.C. App. 527, 813 S.E.2d 463 (2018), *aff’d in part, rev’d in part*, 372 N.C. 196, 827 S.E.2d 302 (2019), noting the panel’s examination of “the specific circumstances of the individual case and parties.” *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306 (internal marks and citation omitted). Specifically, *Bursell I* considered whether the case involved a substantial right as well as “[the] defendant’s [] age, the particular factual bases underlying [the charge or charges], and the nature of those offenses, combined with the State’s and the trial court’s failures to follow well-established precedent in applying for and imposing SBM, and the State’s concession of reversible *Grady* error.” *Id.* (quoting *Bursell I*, 258 N.C. App. at 533, 813 S.E.2d at 467). Though they are not determinative in the exercise of our discretion, we consider these factors below and conclude that invoking Rule 2 to consider Defendant’s constitutional claim is appropriate here.

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First, as Justice Newby noted, “the Fourth Amendment right implicated [by the imposition of SBM] is a substantial right.” *Id.*

Second, these cases bear many factual similarities. In *Bursell I*, the 20-year-old defendant pleaded guilty to statutory rape and indecent liberties with a child after having sex with a 13-year-old girl. 258 N.C. App. at 528, 813 S.E.2d at 464. Defendant here was convicted of three counts of statutory rape of a child, two counts of committing a statutory sex offense with a child, and three counts of taking indecent liberties with a child when he, at 21 years old, had sex with two 12-year-old girls. In both *Bursell I* and the case sub judice, the trial court found the defendants had committed aggravated offenses. *Id.* at 529, 813 S.E.2d at 465. Therefore, Defendant’s age, the factual bases underlying the charges, and the nature of the offenses are all comparable to those in *Bursell*.

In *Bursell I*, our Court considered that the trial court and the State had the benefit of our Court’s precedent in *State v. Blue*, 246 N.C. App. 259, 783 S.E.2d 524 (2016), and *State v. Morris*, 246 N.C. App. 349, 783 S.E.2d 528 (2016), which “made clear that a case for SBM is the State’s to make[.]” *Bursell I*, 258 N.C. App. at 533, 813 S.E.2d at 467 (internal marks and citation omitted). The trial court there “erred by not analyzing the totality of circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations before imposing SBM.” *Id.* (internal marks and citation omitted). The trial court found at sentencing that the “defendant had committed an aggravating offense under the registration and SBM statutes, [and] it summarily concluded that defendant require[d] the highest possible level of supervision and monitoring and ordered that he enroll in lifetime registration and be subject to lifetime SBM.” *Id.* at 529, 813 S.E.2d at 465 (internal marks omitted).

Here, the trial court similarly summarily concluded that SBM should be imposed, without making any findings regarding the reasonableness of the search and without any evidence from the State. However, the State and the trial court here had the benefit of even more guidance regarding the State’s burden than in *Bursell*. Indeed, *State v. Greene*, 255 N.C. App. 780, 806 S.E.2d 343 (2017), *State v. Grady* (“*Grady II*”), 259 N.C. App. 664, 817 S.E.2d 18 (2018), *aff’d as modified*, 372 N.C. 509, 831 S.E.2d 542 (2019) (“*Grady III*”), *State v. Griffin*, 260 N.C. App. 629, 818 S.E.2d 336 (2018), and *State v. Gordon* (“*Gordon I*”), 261 N.C. App. 247, 820 S.E.2d 339 (2018), all were published prior to Defendant’s sentencing hearing. These cases make clear that the trial court must conduct a hearing to determine the constitutionality of ordering a defendant to enroll in the SBM program, and that the State bears the burden of proving the

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reasonableness of the search. *Greene*, 255 N.C. App. at 782, 806 S.E.2d at 345; *Grady II*, 259 N.C. App. at 676, 817 S.E.2d at 28; *Griffin*, 260 N.C. App. at 635, 818 S.E.2d at 341; *Gordon I*, 261 N.C. App. at 253-54, 820 S.E.2d at 344. By the time the trial court imposed SBM here, there were two and a half years' more precedent beyond that which existed at the time of our decision in *Bursell I*, further underlining the appropriate procedure and the State's burden.

The State here has not, as it did in *Bursell I*, conceded that the trial court's failure to conduct a hearing to determine the reasonableness of the search before imposing SBM constitutes error. *See Bursell I*, 258 N.C. App. at 533, 813 S.E.2d at 467. Instead, the State argues that our Supreme Court's decision in *Grady III* does not apply to this case because Defendant does not fall within the category of defendants at issue in *Grady III*: recidivists who have completed their sentence and are not under State supervision. But our Court explicitly rejected the State's argument that *Grady III*'s analysis carries no water with regard to defendants who fall outside of that category in *State v. Griffin* ("*Griffin II*"), \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2020 WL 769356 (2020):

Defendant's circumstances place him outside of the facial aspect of *Grady III*'s holding; he is not an unsupervised recidivist subject to mandatory lifetime SBM[.] . . . Plainly, then, *Grady III*'s holding does not directly determine the outcome of this appeal.

Although *Grady III* does not compel the result we must reach in this case, its reasonableness analysis does provide us with a roadmap to get there. . . . *Grady III* offers guidance as to what factors to consider in determining whether SBM is reasonable under the totality of the circumstances. We thus resolve this appeal by reviewing Defendant's privacy interests and the nature of SBM's intrusion into them before balancing those factors against the State's interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns.

2020 WL 769356, at \*5-6; *see also State v. Gordon* ("*Gordon II*"), \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2020 WL 1263993, at \*5-6 (2020) (utilizing *Grady III* similarly in its analysis). In exercising our discretion, we are not swayed by an argument we have already rejected.

With due consideration of these *Bursell* factors, we invoke Rule 2 and reach the merits of Defendant's appeal.

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## ii. Merits

[3] After determining that a criminal defendant falls into one of the statutory categories that requires the imposition of SBM, *see* N.C. Gen. Stat. § 14-208.40(a)(1)-(3) (2019), “the trial court must conduct a hearing in order to determine the constitutionality of ordering the targeted individual to enroll in the [SBM] program[.]” *Gordon II*, 2020 WL 1263993, at \*1. That determination “depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations.” *Grady I*, 575 U.S. at 310, 135 S. Ct. at 1371. The trial court must weigh the State’s “interest in solving crimes that have been committed, preventing the commission of sex crimes, [and] protecting the public[.]” *Grady III*, 372 N.C. at 545, 831 S.E.2d at 568, against SBM’s “deep . . . intrusion upon [an] individual’s protected Fourth Amendment interests[.]” *id.* at 538, 831 S.E.2d at 564. The State bears the burden of “showing . . . that the [SBM] program furthers [the State’s] interest[s.]” *Id.* at 545, 831 S.E.2d at 568. And where, as here, it seeks the imposition of future SBM following a defendant’s serving a prison sentence, the State also must “demonstrat[e] what [a d]efendant’s threat of reoffending will be after having been incarcerated for” the duration of his sentence with some “individualized measure of [the d]efendant’s threat of reoffending.” *Gordon II*, 2020 WL 1263993, at \*6 (concluding that the State did not meet its burden of proving the reasonableness of “a search of this magnitude approximately fifteen to twenty years in the future”).

Here, after the jury rendered its verdicts, the trial court sentenced Defendant to 300 to 420 months of active imprisonment. The trial court then ordered SBM as follows:

Turning to form 615, the defendant having been convicted of a reportable conviction, Court finds this is a sexually violent offense. Court finds the defendant has not been classified as a sexually violent predator. The Court finds that the defendant is not a recidivist. . . . [T]hese findings are applicable for the statutory rape of a child by an adult and statutory sex offense of a child by an adult, not to taking indecent liberties with a child. The Court finds that the offense of—the convictions of statutory rape and sex offense of a child by an adult is an aggravated offense or are aggravating offenses and that this did involve the sexual abuse of a minor. Pursuant to these findings, the Court hereby orders that the defendant shall register as a sex offender for his natural life, and the Court further

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orders that he shall enroll in satellite-based monitoring for his natural life upon his release.

Turning to the form 615 for the taking indecent liberties with a child, Court finds that the defendant has been convicted of a reportable conviction, this being a sexually violent offense. Defendant has not been classified as a sexually violent predator. The defendant is not a recidivist. That the offense or conviction is not an aggravated offense. That the offense did involve the sexual abuse of a minor. The Court hereby orders that the defendant shall register as a sex offender for the taking indecent liberties with a child for a period of 30 years, and based on marking Block 2C on the satellite-based monitoring, pursuant to finding 5A, the Court orders that the Division of Adult Corrections shall perform a risk assessment of the defendant and report the results to the Court, and then he will be ordered to appear before the Court at a session later to be determined—for determination for satellite-based monitoring for these offenses, and specifically for taking indecent liberties with a child, those three counts.

In sum, the trial court determined that the offenses of which Defendant was convicted were reportable convictions pursuant to N.C. Gen. Stat. § 14-208.6(4) and that Defendant's convictions of statutory rape of a child by an adult and statutory sex offense are sexually violent offenses and aggravated offenses involving the sexual abuse of a minor. Section 14-208.40A(c) requires that defendants convicted of sexually violent offenses or aggravated offenses be subject to SBM. N.C. Gen. Stat. § 14-208.40A(c) (2019).

However, the above was the entirety of the trial court's SBM consideration. The State presented no evidence or testimony at the sentencing hearing regarding the reasonableness of the search entailed by SBM in general or in this instance. And the trial court made no findings regarding the reasonableness of the search, let alone its reasonableness when Defendant is released in 25 to 35 years. Such consideration is constitutionally obligatory. *See, e.g., Gordon II*, 2020 WL 1263993, at \*6.

We therefore hold that the trial court order imposing SBM pursuant to N.C. Gen. Stat. § 14-208.40(a) is unconstitutional as applied to Defendant and must be vacated. *See Bursell I*, 258 N.C. App. at 534, 813 S.E.2d at 468 ("Because no *Grady* hearing was held before the trial court imposed SBM, we vacate its order without prejudice to the State's ability

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to file a subsequent SBM application.”); *Bursell II*, 372 N.C. at 201, 827 S.E.2d at 306 (affirming this Court’s decision in *Bursell I* to vacate the trial court’s SBM order without prejudice).

**IV. Conclusion**

Because we conclude that Defendant was not prejudiced by any remarks made by the prosecutor in closing argument given the evidence of guilt presented by the State, we conclude that Defendant received a trial free from prejudicial error. However, because the trial court failed to hold a *Grady* hearing to determine the reasonableness of lifetime SBM for Defendant, we vacate the imposition of lifetime SBM without prejudice to the State’s ability to file a subsequent SBM application.

NO ERROR IN PART; VACATED IN PART.

Judge ZACHARY concurs.

Judge TYSON concurs in the result in part and dissents in part by separate opinion.

TYSON, Judge, concurring in the result in part and dissenting in part.

Defendant failed to preserve or to carry his burden on appeal to show reversible error occurred in the State’s closing argument. I concur in the result with the portion of the majority’s opinion finding no error in Defendant’s convictions and sentence.

**I. No Jurisdiction Invoked**

Defendant failed to file a notice of appeal from the imposition of SBM as is required under North Carolina Rule of Appellate Procedure 3 to invoke appellate jurisdiction and review. N.C. R. App. P. 3; *see State v. Brooks*, 204 N.C. App. 193, 693 S.E.2d 204 (2010) (requiring written notice of appeal filed under N.C. R. App. P. 3 for review of SBM orders). As such, his appeal of the imposition of SBM is properly dismissed. I respectfully dissent from the majority opinion’s review or analysis of the SBM order.

Recognizing appellate review of this claim is otherwise barred, Defendant filed a petition for writ of certiorari to invoke this Court’s jurisdiction and seek appellate review of the civil order imposing his lifetime enrollment in SBM. To trigger this Court’s discretion to allow

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the petition and issue the writ, Defendant's "petition for this writ [of certiorari] must show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted).

II. Preservation of Constitutional Error

Appellate Rule 10 mandates that in order for Defendant "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1).

Defendant failed to raise any constitutional challenge or otherwise preserve this constitutional claim in violation of Appellate Rule 10 at any point during his sentencing hearing. *See id.* Asserted constitutional errors that were not raised, argued and ruled upon before the trial court cannot be raised for the first time on appeal. *State v. Bishop*, 255 N.C. App. 767, 770, 805 S.E.2d 367, 370 (2017).

III. Rule 2

Defendant concedes he had failed to challenge or preserve any objection to the constitutionality of the imposition of lifetime SBM. His failure to preserve the issue bars appellate review. *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) ("The failure to raise a constitutional issue before the trial court bars appellate review. N.C. R. App. P. 10(b)(1); *State v. Wiley*, 355 N.C. 592, 624, 565 S.E.2d 22, 44-45 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795 (2003); *State v. Golphin*, 352 N.C. 364, 411, 533 S.E.2d 168, 202 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Based upon our long-established law, defendant has waived this issue, and he is barred from raising it on appellate review before this Court. This assignment of error is dismissed."). He requests this Court to exercise its discretion to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits of his claims. N.C. R. App. P. 2.

"Rule 2 relates to the residual power of our appellate courts to consider, *in exceptional circumstances*, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court *and only in such instances*." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis original) (citation omitted). This Court's invocation of the Rule is wholly discretionary and "precedent cannot create an automatic right of review via Rule 2." 369 N.C. at 603, 799 S.E.2d at 603.



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The facts in this case mirror those in *State v. Bishop*, wherein the defendant was convicted of taking indecent liberties with a child and the trial court had imposed SBM for a term of thirty years. 255 N.C. App. at 768, 805 S.E.2d at 368. The defendant had not raised any constitutional issue before the trial court, could not raise it for the first time on appeal, and had waived this argument on appeal. *Id.* at 770, 805 S.E.2d at 370.

As here, the defendant in *Bishop* requested this Court invoke Rule 2 of the North Carolina Rules of Appellate Procedure to hear his arguments and review his constitutional challenge. *Id.* This Court held the defendant was “no different from other defendants who failed to preserve their constitutional arguments in the trial court, and because he has not argued any specific facts that demonstrate manifest injustice if we decline to invoke Rule 2, we do not believe this case is an appropriate use of that extraordinary step.” *Id.* Defendant has failed to demonstrate any reason why this Court should treat his challenge any differently from what it did in *Bishop*. *Id.*; see *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (“Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.”).

In *State v. Hart*, our Supreme Court warned of unwanted implications of our State’s courts not uniformly applying the Rules of Appellate Procedure:

Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority. Furthermore, inconsistent application of the Rules may detract from the deference which federal habeas courts will accord to their application. Although a petitioner’s failure to observe a state procedural rule may constitute an adequate and independent state ground[] barring federal habeas review. a state procedural bar is not adequate unless it has been consistently or regularly applied. Thus, if the Rules [of Appellate Procedure] are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly.

*State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007) (internal citations and quotations omitted).



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IV. No Showing of Merit

Defendant's status does not fall within the category of defendants at issue in *Grady III*, that is, recidivists who have completed their sentence and are no longer under any State supervision. See *Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459 (2015); *State v. Grady*, 372 N.C. 509, 831 S.E.2d 542 (2019) ("*Grady III*").

The trial court must weigh the State's legitimate and compelling "interest in solving crimes that have been committed, preventing the commission of sex crimes, [and] protecting the public[.]" particularly, as here, where there are multiple young minor victims. *Grady III*, 372 N.C. at 545, 831 S.E.2d at 568.

By striking the entire order, the majority's opinion improperly extends *State v. Griffin*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2020 WL 769356 (2020). In *Griffin*, the defendant did not challenge the imposition of SBM during his post-release supervision. *Id.* at \*6. *Griffin* properly recognizes SBM as a special needs search during this period. *Id.*

Here, the trial court properly found the offenses the jury unanimously convicted Defendant of committing were reportable convictions pursuant to N.C. Gen. Stat. § 14-208.6. Defendant's convictions of statutory rape of a child by an adult and statutory sex offense are sexually violent and aggravated offenses involving the sexual abuse of a minor.

Our General Assembly enacted N.C. Gen. Stat. § 14-208.40A(c), which mandates defendants convicted of sexually violent offenses or aggravated offenses to be subject to Satellite Based Monitoring. N.C. Gen. Stat. § 14-208.40A(c) (2019). This legislative choice has withstood and survived constitutional scrutiny. *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L. Ed. 2d 459; *Grady III*, 372 N.C. 509, 831 S.E.2d 542.

To meet the statutory mandate and without any argument or objection from Defendant, the trial court, in open court and in the presence of the Defendant and his counsel, made the following findings of fact under the statute:

Turning to form 615, the defendant having been convicted of a reportable conviction, Court finds this is a sexually violent offense. Court finds the defendant has not been classified as a sexually violent predator. The Court finds that the defendant is not a recidivist. . . . these findings are applicable for the statutory rape of a child by an adult and statutory sex offense of a child by an adult, not to taking indecent liberties with a child. The Court finds

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that the offense of—the convictions of statutory rape and sex offense of a child by an adult is an aggravated offense or are aggravating offenses and that this did involve the sexual abuse of a minor. Pursuant to these findings, the Court hereby orders that the defendant shall register as a sex offender for his natural life, and the Court further orders that he shall enroll in satellite-based monitoring for his natural life upon his release.

Turning to the form 615 for the taking indecent liberties with a child, Court finds that the defendant has been convicted of a reportable conviction, this being a sexually violent offense. Defendant has not been classified as a sexually violent predator. The defendant is not a recidivist. That the offense or conviction is not an aggravated offense. That the offense did involve the sexual abuse of a minor. The Court hereby orders that the defendant shall register as a sex offender for the taking indecent liberties with a child for a period of 30 years, and based on marking Block 2C on the satellite-based monitoring, pursuant to finding 5A, the Court orders that the Division of Adult Corrections shall perform a risk assessment of the defendant and report the results to the Court, and then he will be ordered to appear before the Court at a session later to be determined—for determination for satellite-based monitoring for these offenses, and specifically for taking indecent liberties with a child, those three counts.

Having failed to object at his sentencing hearing, Defendant unlawfully attempts to raise a constitutional violation for the first time on appeal. *Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370. Defendant has not demonstrated any prejudice to merit issuance of the writ. *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9.

Even if we were to agree the trial court failed to hold an extended *Grady* hearing to make further reasonableness findings of lifetime SBM for Defendant *ex mero moto*, that decision is not fatal to vacate the SBM order. In the absence of any demand or objection from Defendant or showing of merit, both his petition for writ of certiorari to invoke jurisdiction to remediate his failure to comply with Appellate Rule 3, or to invoke Appellate Rule 2 to excuse Defendant's failure to comply with Appellate Rule 10 are both properly denied. *See Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370; *Campbell*, 369 N.C. at 603, 799 S.E.2d at 602.

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The entirety of Defendant's arguments on appeal, to excuse his lack of notice of appeal and failure to present and preserve his constitutional challenge, is to assert his notion of a proper role of the trial court and for this Court is to sit as a "second chair" to his defense counsel, or for both courts to act on our own motions solely for his benefit. This notion is not the proper role of either the trial or appellate divisions of the Judicial Branch. "[I]t's [the judge's] job to call balls and strikes and not to pitch or bat." Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary United States Senate, 109 Cong. 56 (Statement of John G. Roberts, Jr.). "It is not the role of the appellate courts . . . to create an appeal for an appellant." *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

Defendant cannot raise a constitutional argument for the first time on appeal. *Bishop*, 255 N.C. App. at 770, 805 S.E.2d at 370. Defendant's petition for writ of certiorari is without merit and is properly denied. *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9. His argument for this Court to exercise our discretion to invoke Rule 2 to overcome his failure to comply with Rule 10 is without merit. *Campbell*, 369 N.C. at 603, 799 S.E.2d at 602.

V. Conclusion

Defendant's convictions and sentence are all properly affirmed as he has failed to preserve or demonstrate either error or prejudice. I concur in the result to find no error in his jury's convictions or in the sentence entered thereon.

Defendant's failure to appeal from or to preserve his purported challenge to his SBM order on constitutional grounds mandates dismissal. His constitutional challenge was neither presented, preserved, and nor ruled upon by the trial court. Defendant is barred from raising these issues for the first time on appeal. I respectfully dissent.

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[271 N.C. App. 370 (2020)]

STATE OF NORTH CAROLINA

v.

CLINTON D. RUCKER

No. COA19-418

Filed 5 May 2020

**Probation and Parole—probation revocation—absconding—willfulness**

In a probation violation hearing, the evidence was sufficient to show defendant willfully absconded where, over a period of months, defendant did not maintain regular contact with his probation officer, never met with any probation officer prior to the filing of a violation report, was not present at any of the home visits made by officers (and the people living at the residence said he no longer lived there), failed to keep the probation officer apprised of his whereabouts, and declined the offer of an ankle monitor.

Appeal by defendant from judgment entered 1 November 2018 by Judge Forrest D. Bridges in Gaston County Superior Court. Heard in the Court of Appeals 4 December 2019.

*Attorney General Joshua H. Stein, by Assistant Attorney General Carole Biggers, for the State.*

*Gilda C. Rodriguez for defendant-appellant.*

BRYANT, Judge.

Where the trial court properly found that defendant willfully absconded, the trial court did not abuse its discretion in revoking defendant's supervised probation. Where there exists a clerical error on the judgment form, we remand the case to the trial court to correct the clerical error.

On 5 July 2017, defendant Clinton D. Rucker appeared before Gaston County Superior Court and pled guilty to one count of possession of methamphetamine and two counts of possession of drug paraphernalia. The trial court accepted defendant's plea, suspended his active term of imprisonment, and ordered supervised probation for 24 months. Defendant was ordered to report to the Gaston County Probation Office, and Officer Jones was assigned to be his probation officer. Over the course of Officer Jones's supervision of defendant,

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she filed two violation reports: one on 14 September 2017 and one on 14 June 2018. On 1 November 2018, defendant's probation violation hearing was held for both reports. The State's evidence, offered through the testimony of Officer Jones, tended to show the following.

On 5 July 2017, defendant was placed on probation and arrived at the Gaston County Probation Office to meet with an intake officer. During intake, defendant provided his contact information—a phone number and residential address at 1837 Amy Drive, Lincolnton, North Carolina, located in Lincoln County (hereinafter “Amy Drive address”). A courtesy transfer was submitted to Lincoln County, at defendant's request, to oversee defendant's supervision based on the address he provided. Defendant was told to report to Officer Jones until the transfer request was approved by Lincoln County. Defendant did not report back.

About two weeks later, a Lincoln County probation officer performed a home visit at the Amy Drive address to verify that defendant was living in Lincoln County. Defendant was not at the address. A friend of defendant's fiancée answered the door and informed the officer that defendant was not staying at the residence because he had been arrested following an altercation with his fiancée. The officer called the Lincoln County jail and confirmed that defendant was in custody for assault on a female. Defendant's transfer request was not accepted by Lincoln County.

On 31 July 2017, more than three weeks after defendant was placed on probation, defendant contacted Officer Jones by telephone. This was the first time defendant had spoken to Officer Jones. Defendant told her that he was appealing the assault charge and that he was back living at the Amy Drive address in Lincoln County. Defendant indicated that he had a valid lease agreement showing proof of residence. A second transfer request was submitted to Lincoln County. Officer Jones instructed defendant that the request would take up to ten days but, in the meantime, to communicate with her. Officer Jones told defendant to call her on 3 August 2017 to discuss reporting instructions. Instead, defendant called Officer Jones the day before their scheduled phone call and left a voicemail.

Thereafter, five additional home visits were made by Lincoln County probation officers to verify defendant's residence at the Amy Drive address. Prior to a scheduled home visit, on 4 August 2017, Officer Jones spoke with defendant and notified him that a home visit would take place that morning. Officers went to the residence and no one answered the door. A door tag was left for defendant to call. The officers returned

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to the address four more times during August; each time was unsuccessful, as defendant was not present at the home. At the last home visit, an officer spoke with a man who stated that he was at the residence to help defendant move to another residence. Defendant's second transfer request to Lincoln County was denied due to the inability of officers to verify that defendant lived at the Amy Drive address.

On 24 August 2017, Officer Jones called defendant to inform him that his transfer request to Lincoln County had been denied. Defendant was asked to provide his current address and, if he could not provide one, he would be deemed homeless. Defendant stated to Officer Jones that the information she had received regarding his living arrangements was inaccurate. Subsequently, Officer Jones offered to put an ankle monitor on defendant, but defendant declined and ended the call. Defendant did not report to Officer Jones's office that afternoon as instructed.

About a week later, Officer Jones attempted to contact defendant at two separate phone numbers that had been provided for him. Of the numbers provided, one was no longer in service. Officer Jones left a message at the other number. Defendant did not call back. Probation officers could not locate defendant or verify his address. Consequently, on 14 September 2017, Officer Jones filed a probation violation report alleging that defendant had willfully violated the following conditions of his probation:

1. Regular Condition of Probation: "Not to abscond, by willfully avoiding supervision or by willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, ON OR ABOUT 08/24/17 AND AFTER NUMEROUS ATTEMPTS TO CONTACT THE DEFENDANT, INCLUDING AT THE LAST KNOWN ADDRESS OF 1837 AMY DRIVE LINCOLNTON, NC 28092, THE SAID DEFENDANT HAS REFUSED TO MAKE HIMSELF AVAILABLE FOR SUPERVISION AS INSTRUCTED BY THE PROBATION OFFICER, THEREBY ABSCONDING SUPERVISION.
2. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places. . ." in that, ON OR ABOUT 07/05/17, THE DEFENDANT FAILED TO REPORT TO SUPERVISING OFFICER AS INSTRUCTED BY THE COURTS AFTER INTAKE. ON OR ABOUT 08/24/17, THE DEFEND[AN]T FAILED TO REPORT TO SUPERVISING OFFICER AS INSTRUCTED.

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3. Condition of Probation: “The defendant shall pay to the Clerk of Superior Court the ‘Total Amount Due’ as directed by the Court or probation Officer” in that, AS OF THE DATE OF THIS REPORT, THE DEFENDANT HAS PAID \$00.00 ON A TOTAL AMOUNT DUE OF \$492.50 COURT INDEBTEDNESS. THE DEFENDANT HAS PAID \$00.00 OF A TOTAL AMOUNT DUE OF \$80.00 PSF. THE DEFENDANT HAS AN OUTSTANDING BALANCE OF \$592.50 CI AND PSF.
4. General statute 15A-1343 (b)(1) “Commit no criminal offense in jurisdiction” in that, ON OR ABOUT 09/06/17, THE DEFENDANT WAS CHARGED WITH: FAILURE TO REDUCE SPEED, LINCOLN CO. CASE NO. 17CR704082, DWLR-NOT IMPAIRED REVOCATION, LINCOLN CO. CASE NO. 17CR704082, POSS/DISP/ALT/FIC REVD DR LIC, LINCOLN CO. CASE NO. 17CR704083 THE DEFENDANT DID VIOLATE REGULAR CONDITIONS OF PROBATION G.S. 15A-1343(b)(1) IN THAT HE IS NOT TO COMMIT A CRIME IN ANY JURISDICTON.<sup>[1]</sup>

A warrant was later issued for defendant’s arrest. On 6 October 2017, defendant was arrested based on the probation violation report filed by Officer Jones. A preliminary hearing on the violations was held on 23 October 2017. Defendant posted bond and was released from custody on 28 October 2017. While defendant was advised to report to Officer Jones within 24 hours of his release from custody, defendant failed to report as instructed.

On 1 November 2017, an unidentified woman contacted Officer Jones and told her defendant was trying to reach her. The woman provided Officer Jones with a phone number for defendant. Officer Jones contacted defendant and instructed him to report to her office. Soon thereafter, defendant met with Officer Jones for their first in-person meeting. Defendant told Officer Jones that he would be living with his father-in-law in Gaston County.

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1. On this record, defendant denied the first two violations at the probation violation hearing but admitted to the third violation in the original report. The State struck the fourth violation from the original report because the charges were unresolved. Thus, we consider and address only the first two allegations in the original report upon which defendant’s probation could be revoked.

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On 10 January 2018, Officer Jones attempted to conduct a home visit at the father-in-law's residence in Gaston County but defendant was not present. Two weeks later, Officer Jones conducted another home visit. Although defendant was present in the home, there appeared to be no personal items in the home that belonged to defendant.

On 29 January 2018, defendant sent Officer Jones a copy of a lease agreement for a new address in Lincoln County. Officer Jones submitted a third transfer request from Gaston to Lincoln County. A home visit was conducted, and defendant was present. On 15 March 2018, the transfer request was accepted in Lincoln County, and defendant's case was reasigned to Lincoln County for supervision. Defendant provided a new phone number and reported to his scheduled appointments as directed.

On 6 May 2018, a Lincoln County probation officer attempted a home visit. Defendant was not home. The officer left a door tag instructing him to report to the office the following day. Defendant failed to report as instructed. The Lincoln County Probation Office conducted another home visit on 22 May 2018. Defendant was not home, but an eviction notice dated 18 May 2018 was attached to the door. Defendant did not notify the officer that he was getting evicted. The officer attempted to contact defendant using the numbers he had provided; however, those numbers were not in service.

On 31 May 2018, the officer returned to the home and left a door tag instructing him to report to the office next day. After defendant missed his appointment, his case was transferred back to Gaston County. On 14 June 2018, Officer Jones filed an addendum to the probation violation report alleging additional violations:

1. Regular Condition of Probation: General Statute 15A-1343(b)(3a) "Not to abscond, by willfully avoiding supervision willfully making the supervisee's whereabouts unknown to the supervising probation officer" in that, ON OR ABOUT 5/22/2018, THE DEFENDANT LEFT HIS PLACE OF RESIDENCE AT 1655 KNOLL DRIVE, VALE, NC 28168 WITHOUT PRIOR APPROVAL OR KNOWLEDGE OF HIS PROBATION OFFICER AND FAILED TO MAKE HIS WHEREABOUTS KNOWN, MAKING HIMSELF UNAVAILABLE FOR SUPERVISION AND THEREBY ABSCONDING SUPERVISION. AS OF THE DATE OF THIS REPORT, THE DEFENDANT'S WHEREABOUTS ARE UNKNOWN AND ALL EFFORTS TO LOCATE HIM HAVE BEEN UNSUCCESSFUL.



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2. “Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places” in that, ON 5/7/18 AND 6/1/18, THE DEFENDANT FAILED TO REPORT TO SUPERVISING OFFICER AS INSTRUCTED.<sup>[2]</sup>

A warrant was issued for defendant’s arrest based on the new violations. Defendant turned himself in on 9 August 2018.

At the close of the hearing, the trial court found that defendant violated his probation by absconding and ordered revocation of his probation. A Judgment and Commitment Upon Revocation of Probation Order was entered and defendant’s sentence of imprisonment was activated. Defendant appeals.

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On appeal, defendant raises two issues: I) the trial court abused its discretion by revoking defendant’s probation after finding that defendant absconded supervision, and II) judgment upon revocation should be remanded to correct a clerical error.

*I*

First, defendant argues the trial court erred in revoking his probation based on its finding that he willfully absconded from supervision. We disagree.

A trial court’s decision to revoke a defendant’s probation is reviewed for an abuse of discretion. *See State v. Young*, 190 N.C. App. 458, 459, 660 S.E.2d 574, 576 (2008) (“[T]he evidence [must] be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation or that the defendant has violated without lawful excuse a valid condition upon which the sentence was suspended.” (citation and quotation marks omitted)).

Pursuant to N.C. Gen. Stat. § 15A-1343 (“Conditions of probation”), regular conditions are placed on a defendant’s probationary sentence, which requires, *inter alia*, that a defendant must “[n]ot abscond by willfully avoiding supervision or by willfully making the defendant’s whereabouts unknown to the supervising probation officer, if the defendant is placed on supervised probation.” N.C. Gen. Stat. § 15A-1343(b)(3a) (2019). By definition, a defendant “absconds” if he makes willful attempts

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2. At the hearing, defendant denied both allegations in the addendum report.

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to conceal his whereabouts, and the probation officer is unable to contact the defendant as a result. *Id.* Upon notification that a defendant has willfully absconded, the trial court is authorized to revoke probation and impose a period of imprisonment in response to the violation. *See id.* § 15A-1344(a) (“The court may only revoke probation for a violation of a condition of probation under . . . G.S. 15A-1343(b)(3a) [stating that a defendant must not willfully abscond from supervision]”).

In the instant case, the trial court, after considering all the evidence, found that defendant had absconded in violation of N.C.G.S. § 15A-1343(b)(3a). Defendant argues there was insufficient evidence that his actions were willful to constitute absconding as he neither avoided supervision nor made his whereabouts unknown to probation officers. In support of his argument, defendant cites to *State v. Williams*, 243 N.C. App. 198, 776 S.E.2d 741 (2015), and *State v. Krider*, 258 N.C. App. 111, 810 S.E.2d 828, *writ allowed*, 371 N.C. 114, 813 S.E.2d 248 (2018), *aff’d as modified*, 371 N.C. 466, 818 S.E.2d 102 (2018). However, *Williams* and *Krider* are inapposite to the facts in the instant case.

In *Williams*, this Court closely examined the statutory interpretation of “absconding” to revoke probation which, prior to the enactment of the Justice Reinvestment Act of 2011 (“JRA”), had not been defined by statute. 243 N.C. App. at 198, 776 S.E.2d at 741. The defendant was found to be an absconder after his probation officer discovered that the defendant had been traveling out-of-state without permission. *Id.* at 198–99, 776 S.E.2d at 742. In addition, the defendant had missed his scheduled appointments with the probation officer. This Court reasoned that while the evidence established that the defendant violated regular conditions of his probation, the evidence could not satisfy N.C.G.S. § 15A-1343(b)(3a) for absconding because the officer was privy to the unauthorized trips. *Id.* at 204–05, 776 S.E.2d at 745–46. The officer could contact the defendant and did, in fact, communicate with him several times by phone. *Id.* Therefore, under the statute, defendant’s whereabouts were known to the probation officer and this Court reversed the revocation of the defendant’s probation.

Similarly, in *State v. Krider*, this Court found that the defendant’s actions did not rise to the level of absconding as required to revoke probation. In *Krider*, a probation officer made an unscheduled visit to an address provided by the defendant. 258 N.C. App. at 112, 810 S.E.2d at 829. The defendant was not present at the home, and the officer was advised by an unidentified woman that the defendant “didn’t live there.” *Id.* The officer made no further attempts to contact the defendant and seven days later, filed a report alleging that the defendant had willfully

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absconded probation because his “whereabouts were unknown for two months.” *Id.* This Court found that the State failed to demonstrate that the defendant’s conduct was willful, where the probation officer filed a violation report after making only one visit to the defendant’s listed residence and “there was no evidence that [the] defendant was even aware of [the] unannounced visit until after his arrest.” *Id.* at 117, 810 S.E.2d at 832. Additionally, following his arrest, the defendant met with the probation officer at the residence, maintained regular contact until the expiration of his probation period, and satisfied all other conditions of his probation. *Id.* at 116, 810 S.E.2d at 831. Therefore, this Court vacated the revocation of the defendant’s probation.

Here, on these facts, it is significant that defendant’s conduct was willful as he avoided probation officers for several months. From 5 July 2017 to 14 September 2017—the date of the first violation report—approximately six home visits were attempted by multiple probation officers to verify defendant’s residence at the address he provided. Defendant was not present for any of the home visits. On two of those home visits, contrary to *Krider*, individuals who *knew* defendant informed the officers that defendant no longer lived at the residence or that he had plans to move from the residence. A door tag was left notifying defendant that the officers were attempting to locate him and even instructed defendant to report to the office. Defendant did not comply.

Despite being on notice to maintain regular contact with probation officers, neither Officer Jones nor any probation officer in Lincoln County had ever met defendant in person after his initial intake, prior to the filing of his first violation report. In fact, Officer Jones testified that she only spoke to defendant on three occasions: 31 July, 4 August, and 24 August. Of the few times that defendant could be reached by phone, he was notified of a scheduled visit before they arrived. Not only was defendant absent from the home, but he also failed to keep Officer Jones apprised of his whereabouts. Due to difficulties ascertaining defendant’s whereabouts, Officer Jones offered defendant an ankle monitor. Defendant declined just before abruptly ending the phone call, and thereafter, failing to report.

Unlike in *Williams* and *Krider*, we believe that defendant was properly found to have absconded because his whereabouts were truly unknown to probation officers. *See generally State v. Newsome*, \_\_\_ N.C. App. \_\_\_, 828 S.E.2d 495 (2019); *see also State v. Trent*, 254 N.C. App. 809, 803 S.E.2d 224 (2017) (finding there was sufficient evidence that the defendant had willfully absconded, and thereby, made his whereabouts unknown, as the probation officer had “absolutely no means”

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of contacting the defendant; the defendant did not wear a monitoring device; the defendant was not present during two unannounced visits at the reported address; and the defendant knew the probation officer had visited the residence while he was away but did not contact the officer when he returned).

Even after defendant was released from custody for parole violations relating to absconding, the record reveals that he was advised to report to Officer Jones within 24 hours. Defendant was on notice that he was considered to be an absconder and that officers were attempting to actively monitor his whereabouts. *See Newsome*, \_\_\_ N.C. App. at \_\_\_, 828 S.E.2d at 499. Notwithstanding defendant's responsibility to comply with his probation terms, defendant failed to report to Officer Jones within the specified time as instructed. Additionally, when defendant's case was finally transferred to Lincoln County and he was instructed to report to that office, officers still had difficulty contacting him. Defendant also failed to notify officers upon getting evicted from his listed residence.

We find the State's allegations and supporting evidence—reflecting defendant's continuous, willful pattern of avoiding supervision and making his whereabouts unknown—sufficient to support the trial court's exercise of discretion in revoking defendant's probation for absconding. Moreover, “once the State presented competent evidence establishing defendant's failure to comply with the terms of his probation, the burden [is then] on defendant to demonstrate through competent evidence his inability to comply with those terms.” *Trent*, 254 N.C. App. at 819, 803 S.E.2d at 231. While defendant contends that his employment—as a “self-employed” carpenter—affected his ability to comply with his probation supervision, we remain unpersuaded by his argument as defendant did not inform Officer Jones or any officer of his work commitments. Defendant even admitted at the hearing that he was “pretty much homeless” at one point; further supporting that he was aware that he could have obtained an ankle monitor but willfully avoided it.

Therefore, defendant's argument is overruled.

## II

Also, defendant argues, and the State concedes, that his case should be remanded back to the trial court to correct a clerical error in the judgment. We agree.

“When, on appeal, a clerical error is discovered in the trial court's judgment or order, it is appropriate to remand the case to the trial court

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for correction because of the importance that the record speak the truth.” *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696 (2008) (citation and quotation marks omitted).

Here, a review of the record reveals that defendant was present for his probation hearing and testified as a witness. Defendant denied the first two allegations listed in the original report and all the allegations in the addendum report. However, on the judgment form, the trial court checked the box stating: “the defendant waived a violation hearing and admitted that he/she violated each of the conditions of his/her probation as set forth below.” Thus, it is clear the trial court committed a clerical error when it checked the box indicating otherwise.

Accordingly, we remand to allow the trial court to correct a clerical error as noted herein.

**AFFIRMED IN PART; REMANDED IN PART.**

Judges COLLINS and HAMPSON concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MAY 2020)

HILL v. KENNEDY No. 19-171	Cabarrus (15CVD2731)	Reversed and Remanded
IN RE A.G.B. No. 19-298	Surry (15JA48)	Affirmed
IN RE FORECLOSURE OF FOSTER No. 19-1034	Durham (16SP307)	Dismissed
IN RE WHITAKER No. 19-1002	N.C. Utilities Commission (E-7) (SUB1159)	Affirmed
LEQUIRE v. SE. CONSTR. & EQUIP. CO., INC. No. 19-603-2	N.C. Industrial Commission (16-744994)	Affirmed
MEJIA v. MEJIA No. 19-438	Mecklenburg (17CVD13888)	Affirmed
PRIVETTE v. N.C. BD. OF DENTAL EXAM'RS No. 19-1048	Wake (18CVS12775)	Affirmed
SCROGGS v. TRACTORS ON THE CREEK, LLC No. 19-828	Buncombe (17CVD5275)	Dismissed
SMITH v. SMITH No. 19-1049	Mecklenburg (15CVD23619)	Vacated and Remanded
SPENCER v. AUGHTRY No. 19-956	Henderson (17CVS1449)	Affirmed in Part, Reversed and Remanded
STATE v. BERNICKI No. 19-649	New Hanover (17CRS53352)	No Error
STATE v. BYNUM No. 19-933	Onslow (17CRS57416)	Reversed and Remanded
STATE v. DIOP No. 19-200	Wake (16CRS206790-91)	No Error
STATE v. FAULK No. 19-693	Columbus (15CRS50062) (16CRS918)	No Error in Part; No Prejudicial Error in Part

STATE v. GREEN No. 19-272	Alamance (17CRS50194)	No Error
STATE v. GREENE No. 19-688	Watauga (17CRS50918)	No Error
STATE v. HIGGINBOTHAM No. 19-989	Wake (17CRS212577)	Affirmed
STATE v. HOLT No. 19-477	Bladen (16CRS50689)	No plain error in part; Dismissed without prejudice in part.
STATE v. McCLURE No. 19-562	Clay (17CRS53-54)	No Error
STATE v. McCULLEN No. 19-319	Cleveland (18CRS1218)	No Error
STATE v. McLYMORE No. 19-428	Cumberland (14CRS54278-80)	No Error
STATE v. MOORE No. 19-417	McDowell (17CRS204)	No Error
STATE v. MURRAY No. 19-516	Wake (17CRS201843)	Dismissed
STATE v. PITTS No. 19-362	Forsyth (17CRS1397) (17CRS53401-02)	No Error
STATE v. RIVERA No. 19-426	Wake (16CRS219028-29)	No Error
STATE v. SILVER No. 19-978	Nash (17CRS50290) (17CRS50291)	Dismissed
STATE v. TAYLOR No. 19-893	Mecklenburg (16CRS238053) (17CRS21825)	No Error
STATE v. WILLIAMS No. 19-188	Richmond (16CRS1374) (16CRS52466) (16CRS52468-69)	No Error
STATE v. WILLIS No. 18-507	Lenoir (14CRS51470)	Reversed

STATE v. ZACHARY  
No. 19-915

Beaufort  
(16CRS51041-42)

Vacated and Remanded

WALKER v. SURLES  
No. 19-880

Pitt  
(06CVD3540)

Dismissed

WILLIAMS v. WILLIAMS  
No. 19-484

Guilford  
(15CVD8816)

Affirmed in Part,  
Dismissed in Part



**HAMDAN v. FREITEKH**

[271 N.C. App. 383 (2020)]

MAMOUN ALI MOHAMMAD HAMDAN, PETITIONER

v.

NAFISEH ALI ASAD FREITEKH, RESPONDENT

No. COA19-929

Filed 19 May 2020

**Child Custody and Support—Uniform Child-Custody Jurisdiction and Enforcement Act—requirement of certified copy of foreign custody determination—subject matter jurisdiction**

Where the copies of the provisional and final child-custody determinations petitioner-father presented to the trial court and sought to enforce under the Uniform Child-Custody Jurisdiction and Enforcement Act were stamped “Jerusalem Shar’ia Court” but did not otherwise state they were certified true copies of the original official documents, the petition did not include certified copies of the foreign custody determination as required by N.C.G.S. §§ 50A-305(a)(2) and -308(a). Therefore, the trial court lacked subject matter jurisdiction and its order enforcing the shar’ia court’s child-custody determinations was vacated.

Appeal by respondent from orders entered 11 March 2019, 21 June 2019, 13 August 2019, and 30 August 2019 by Judge Stephen V. Higdon in Union County District Court. Heard in the Court of Appeals 5 February 2020.

*Passenant & Shearin Law, by Brione B. Pattison, and Miles & Stockbridge P.C., by Kelly A. Powers, for petitioner-appellee.*

*James, McElroy & Diehl, P.A., by Preston O. Odom, III, for respondent-appellant.*

ZACHARY, Judge.

Respondent Nafiseh Ali Asad Freitekh (“Mother”) and Petitioner Mamoun Ali Mohammad Hamdan (“Father”) are married and have three minor children. In 2018, Mother and the children moved from the marital home in the Middle East to the United States. Father then commenced an action in North Carolina under the Uniform Child-Custody Jurisdiction and Enforcement Act seeking to enforce the provisional and final child-custody determinations issued by the Shar’ia Court of Jerusalem. Over the course of several months, the trial court issued numerous orders in

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favor of Father. Mother now appeals those orders. After careful review, we vacate the orders for lack of subject-matter jurisdiction.

**Background<sup>1</sup>**

The parties married in 2005, and three children were born to the marriage. Both parties acknowledge that Father did not reside with the rest of the family for much of the children's lives, although the reason is disputed. Father maintains that, "due to [his] political involvement in Israeli-Palestinian matters . . . the Israeli government banned [him] from entering the country." Accordingly, he lived in Ramallah, Palestine, fifteen minutes away from Mother and the children in Jerusalem, Israel. Mother, however, claims that she and the children also lived in Ramallah, Palestine, and that "[f]or much of the children's lives, [she] did not know where [Father] was living[.]" According to Mother, "Father is often incarcerated or a fugitive[.]"

On 17 September 2018, Father called Mother in the morning, as was the parties' daily custom. But when Father called again after school let out a few hours later, Mother's phone was turned off. He continued to call over "the next several" days, never successfully reaching her.

Father then learned that Mother intended to take the children to the United States. Father filed an action with the Shar'ia Court of Jerusalem seeking to prevent Mother from leaving the country with the children without obtaining Father's consent.<sup>2</sup> On 2 October 2018, the Shar'ia Court entered an order "prohibiting the children from leaving Israel" and finding that "Mother did not have the right to leave [Israel] with the children without Father's consent." By that time, however, Mother had already left the country.

Father subsequently returned to the Shar'ia Court for a determination as to the custody of the children. On 29 November 2018, the Shar'ia Court entered its provisional order, pursuant to the terms of which "the children would live with [Mother] in Israel during the week and would stay overnight with [Father] in Palestine every weekend," adopting what Father stated was "the family's previously agreed-upon arrangements." In accordance with Israeli law, the Shar'ia Court ordered that notice of the provisional custody order be served on Mother at her last known address in Jerusalem, as well as by publication in the official

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1. The record and briefs make clear that the underlying facts of this case are disputed, with the parties intensely disagreeing on their marital circumstances prior to Mother's decision to move to the United States.

2. The Shar'ia Court resolves private disputes among Muslims.

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newspaper. The notice provided that Mother would have “an opportunity to be heard on any timely objections to the terms of the provisional custody order becoming a final custody order.” Because Mother never objected or appeared in court, the Shar’ia Court entered its final order on 10 February 2019. The parties refer to the provisional child-custody determination and the final child-custody determination collectively as the “Child Custody Order.”

Father eventually located Mother in North Carolina. On 11 March 2019, he petitioned the Union County District Court, pursuant to the Uniform Child-Custody Jurisdiction and Enforcement Act (“UCCJEA”), to (1) “register and enforce on an expedited basis the . . . certified child[-] custody determination” of the Shar’ia Court; (2) “enter an emergency *ex parte* order to take physical custody of the passports of [Mother] and minor children during the pendency of these proceedings”; and (3) “hold a hearing on [Father’s] enforcement request on the first available day on the [c]ourt’s calendar after the time for [Mother’s] response to this Verified Petition has expired[.]” The same day that the petition was filed, the trial court ordered, *inter alia*, that Mother (1) was prohibited from removing the children from the jurisdiction of the court, (2) appear on 3 April 2019 “for an expedited hearing on the merits of [Father’s] Verified Petition if [she] declines to participate in a voluntary return of the children to Israel before that date[.]” and (3) “surrender any and all passports and other travel documents in her possession[.]”

In her response to Father’s petition, Mother admitted that she had moved to the United States with the children on 18 September 2018. She emphasized, however, that she “fled with the children to North Carolina . . . in order to escape the physical, verbal, and emotional abuse” by Father, as well as her fear that Father was a member of “a radical Islamic group[.]” from whom the children were increasingly exposed to “extremist ideology[.]” Additionally, she noted that while she has an Israeli identification card, she is not an Israeli citizen, and that she had been living with the children in Ramallah, Palestine.

A hearing on the matter was held in Union County District Court on 28 May 2019, the Honorable Stephen V. Higdon presiding. On 21 June 2019, the trial court entered an order finding that the Shar’ia Court had jurisdiction under the UCCJEA to enter the Child Custody Order, and that Mother was provided with adequate notice and opportunity to be heard on the matter in the Shar’ia Court. The trial court granted Father’s petition for UCCJEA registration of the Shar’ia Court’s child-custody determination, and confirmed that it was registered in accordance with the UCCJEA.

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Two weeks later, Father filed a “motion for enforcement of UCCJEA confirmed child[-]custody determination[.]” On 13 August 2019, the trial court granted the motion, ordering that Mother “return the minor children . . . to the jurisdiction of the Shar’ia Court . . . by 31 August[ ] 2019.” The trial court instructed Mother to notify Father’s counsel whether she would be returning with the children by 16 August 2019. When Mother failed to do so, Father’s counsel filed notice of “noncompliance with UCCJEA order[.]”

On 22 August 2019, Mother filed notice of appeal to this Court from (1) “the UCCJEA order enforcing [the] confirmed child[-]custody determination”; (2) “the UCCJEA order confirming registration and enforcing the child[-]custody determination”; and (3) “the UCCJEA order regarding [the children’s] passports, travel documents and scheduling [the] expedited enforcement hearing[.]”

On 23 August 2019, Father filed a motion with “proposed alternative travel arrangements” in light of Mother’s failure to comply with the trial court’s enforcement order. By order entered 30 August 2019, the trial court approved of the alternative travel arrangements. On 4 September 2019, Mother again filed notice of appeal to this Court, appealing the same orders listed in her 22 August 2019 notice of appeal, and adding the UCCJEA order approving of the alternative travel arrangements.

**Discussion**

Mother contends that (1) the trial court lacked subject-matter jurisdiction to register and enforce the Shar’ia Court’s “default custody order”; (2) the trial court erred by registering and enforcing the “default custody order”; and (3) both the enforcement order and travel-approval order are void or otherwise unenforceable. The jurisdictional issue is dispositive.

**I. The UCCJEA**

The UCCJEA provides a uniform set of jurisdictional rules and guidelines for the national and international enforcement of child-custody orders. *See Creighton v. Lazell-Frankel*, 178 N.C. App. 227, 230, 630 S.E.2d 738, 740 (2006); N.C. Gen. Stat. § 50A-105 (2019). The Act aims “to prevent parents from forum shopping their child[-]custody disputes and assure that these disputes are litigated in the state with which the child and the child’s family have the closest connection.” *In re Q.V.*, 164 N.C. App. 737, 742, 596 S.E.2d 867, 870-71 (citation omitted), *cert. denied*, 358 N.C. 732, 601 S.E.2d 859 (2004).

As adopted by the North Carolina General Assembly, the UCCJEA provides broad definitions of a “child-custody determination” and a

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“child-custody proceeding.” *See generally* N.C. Gen. Stat. § 50A-102(3) & (4). A “child-custody determination” is defined as “a judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child.” *Id.* § 50A-102(3); *see also id.* cmt. (noting that a child-custody determination under the UCCJEA “encompasses *any* judgment, decree or other order which provides for the custody of, or visitation with, a child” (emphasis added)).

Part 2 of the UCCJEA addresses jurisdiction. Section 50A-201 addresses the issue of whether North Carolina courts have jurisdiction over initial child-custody determinations. *Id.* § 50A-201. If there exists a home state—“the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding”—then that state may make an initial child-custody determination. *Id.* §§ 50A-102(7) and -201(a). The home state retains “exclusive, continuing jurisdiction over the determination” until either (1) there is no longer a significant relationship between any of the parties and the state, and there is no longer any substantial evidence available in the state “concerning the child’s care, protection, training, and personal relationships,” or (2) none of the parties reside in the state. *Id.* § 50A-202(a)(1)-(2). “[A] trial court must comply with [these] provisions [of the UCCJEA] to obtain jurisdiction in such cases.” *In re S.E., S.A., J.A., & V.W.*, \_\_\_ N.C. \_\_\_, \_\_\_, 838 S.E.2d 328, 331 (2020) (citations omitted).

Once jurisdiction has been established, Part 3 of the UCCJEA governs the enforcement of a child-custody determination. “[A] custody determination of another State will be enforced in the same manner as a custody determination made by a court of this State.” N.C. Gen. Stat. § 50A-303 cmt.; *see id.* § 50A-303(a) (“A court of this State shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this Article or the determination was made under factual circumstances meeting the jurisdictional standards of this Article, and the determination has not been modified in accordance with this Article.”).

Pursuant to section 50A-305, the out-of-state child-custody determination may be registered for enforcement by sending the following materials to the appropriate North Carolina court:

- (1) A letter or other document requesting registration;
- (2) Two copies, including one certified copy, of the determination sought to be registered, and a statement under penalty of perjury that to the best of the knowledge and

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belief of the person seeking registration the order has not been modified; and

(3) Except as otherwise provided in [N.C. Gen. Stat. §] 50A-209, the name and address of the person seeking registration and any parent or person acting as a parent who has been awarded custody or visitation in the child-custody determination sought to be registered.

*Id.* § 50A-305(a). The custody determination may “be registered without an accompanying request for enforcement.” *Id.* cmt.

The UCCJEA also provides an expedited method for enforcement of a child-custody determination, “the normal remedy that will be used in interstate cases . . . based on habeas corpus.” *Id.* § 50A-308 cmt. Where the petitioner seeks an expedited enforcement of the child-custody determination, the petition “must be verified,” and “[c]ertified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition.” *Id.* § 50A-308(a). The official comment to this section explains the purpose of these specifications:

The petition is intended to provide the court with as much information as possible. Attaching certified copies of all orders sought to be enforced allows the court to have the necessary information. Most of the information relates to the permissible scope of the court’s inquiry. The petitioner has the responsibility to inform the court of all proceedings that would affect the current enforcement action.

*Id.* § 50A-308 cmt.

The provisions of the UCCJEA apply internationally, as well as between states. North Carolina courts “treat a foreign country as if it were a state of the United States for the purpose of applying” general provisions and jurisdictional evaluations, unless “the child-custody law of a foreign country violates fundamental principles of human rights.” *Id.* § 50A-105(a) & (c). Child-custody determinations issued by a court of “a foreign country under factual circumstances in substantial conformity with the jurisdictional standards of this Article must be recognized and enforced under Part 3.” *Id.* § 50A-105(b). If the foreign country’s child-custody law “violates basic principles relating to the protection of human rights and fundamental freedoms[,]” the trial court “may refuse to apply this Act.” *Id.* § 50A-105 cmt.

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**II. Standard of Review**

“Whether the trial court has jurisdiction under the UCCJEA is a question of law” reviewed de novo. *In re J.H.*, 244 N.C. App. 255, 260, 780 S.E.2d 228, 233 (2015) (citations omitted). Under this standard of review, an appellate court “considers the matter anew and freely substitutes its own judgment for that of the trial court.” *In re T.N.G.*, 244 N.C. App. 398, 402, 781 S.E.2d 93, 97 (2015) (citations omitted). “[S]ubject-matter jurisdiction may be challenged *at any stage of the proceedings*.” *In re J.H.*, 244 N.C. App. at 259, 780 S.E.2d at 233 (citation omitted).

**III. Analysis**

Mother asserts that the trial court lacked subject-matter jurisdiction to enter any orders in this case, because Father failed to include certified copies of the Shar’ia Court’s provisional and final child-custody determinations with his petition, as required by N.C. Gen. Stat. §§ 50A-305(a)(2) and -308(a). We agree.

“Subject-matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it.” *In re K.U.-S.G.*, 208 N.C. App. 128, 131, 702 S.E.2d 103, 105 (2010) (citation and internal quotation marks omitted). It follows that an inquiry into a court’s subject-matter jurisdiction will precede an analysis of the underlying merits. *See Cody v. Hovey*, 219 N.C. 369, 376, 14 S.E.2d 30, 34 (1941) (noting the trial court’s duty “to consider and determine the facts affecting the jurisdiction of the court before proceeding to render final judgment”); *In re J.H.*, 244 N.C. App. at 259, 780 S.E.2d at 233 (“It is axiomatic that a trial court must have subject[-]matter jurisdiction over a case to act in that case.” (citation omitted)). “[T]he jurisdictional requirements of the UCCJEA must be met for a court to have power to adjudicate child[-]custody disputes.” *Foley v. Foley*, 156 N.C. App. 409, 411, 576 S.E.2d 383, 385 (2003) (citation omitted).

The UCCJEA does not define the term “certified copy.” Thus, in the absence of a definition, we consider the term’s ordinary meaning. *See Transp. Serv. v. Cty. of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973) (“Unless the contrary appears, it is presumed that the Legislature intended the words of the statute to be given the meaning which they had in ordinary speech at the time the statute was enacted.” (citations omitted)). “A ‘certified copy’ is ordinarily defined as ‘[a] copy of a document or record, signed and certified as a *true copy* by the officer to whose custody the original is [e]ntrusted.’” *State v. Gant*, 153 N.C. App. 136, 143, 568 S.E.2d 909, 913 (citation omitted), *disc. review denied*, 356 N.C. 440, 572 S.E.2d 792 (2002); *see also Certified Copy*, Black’s Law



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Dictionary 410 (10th ed. 2014) (defining a “certified copy” as “[a] duplicate of an original (usu[ally] official) document, certified as an exact reproduction usu[ally] by the officer responsible for issuing or keeping the original”).

Here, two copies of the provisional child-custody determination issued by the Shar’ia Court on 29 November 2018 were included in Father’s petition for registration, one in English and one in Arabic; however, there is nothing to evidence that either of these are certified copies of the original provisional child-custody determination. Although there is a notarized certification that the English translation (from Arabic) was accurate, neither the English translation nor the certification that the English translation was accurate indicate that Father included a certified copy of the provisional child-custody determination with his petition.

A copy of the Shar’ia Court’s final child-custody determination was also included with Father’s petition. However, Father failed to provide the requisite English translation of the final child-custody determination issued by the Shar’ia Court on 13 February 2019. *See* N.C. Gen. Stat. § 52C-7-713 (“A record filed with a tribunal of this State under this Article must be in the original language and, if not in English, must be accompanied by an English translation.”). Moreover, there is no indication that the untranslated document purporting to be a copy of the final child-custody determination is certified to be an exact reproduction of the Shar’ia Court’s original final child-custody determination.

Father asserts that the stamp on the copies of provisional and final child-custody determinations reading “Jerusalem Shar’ia Court” is evidence that these documents are certified true copies of the original provisional and final child-custody determinations. However, this stamp is not sufficient to render either document a certified copy of the Shar’ia Court’s child-custody determination. It does not state that the documents are certified true copies, or otherwise indicate that the documents are certified to be duplicates of the original official documents. Thus, there is no indication that Father’s petition included a certified copy of either the provisional child-custody determination or the final child-custody determination.

In addition, Father emphasizes that he provided “a statement under penalty of perjury that to the best of [his] knowledge and belief . . . the order has not been modified[.]” N.C. Gen. Stat. § 50A-305(a)(2). But this is just one requirement set forth in that provision. The full subsection explicitly requires that the petition include “[t]wo copies, including one certified copy, of the determination sought to be registered, *and* a



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statement under penalty of perjury that to the best of the knowledge and belief of the person seeking registration the order has not been modified”—not one or the other, but both. *Id.* (emphasis added).

Moreover, Father contends that “the lower court confirmed on the record in open court that the original certified copies are indeed contained in the court file.” This statement mischaracterizes the transcript. At the hearing, Father’s attorney stated, “And, Your Honor, in compliance with the UCCJEA registration provisions, the original certified copy of this Order is in the court file[,]” to which the trial court responded, “Okay.” Later, Father’s attorney stated that “the original certified [copies of the final child-custody determination] are in the court file[,]” to which the trial court did not respond. Neither statement constitutes confirmation of certification on the record in open court. Regardless, the absence in the record on appeal of proof that either the provisional or final child-custody determinations were certified compels the conclusion that there were no certified copies of the Shar’ia Court’s child-custody determinations in the court file.

We also reject Father’s position that Mother has waived any argument related to certification because she failed to raise the issue at trial. This contention—made for the first time at oral argument—would have us conclude that the production of a certified copy is the equivalent of *authentication*, and that the failure to object before the trial court waives appellate review. This argument lacks merit. One of the primary purposes of the UCCJEA is to “[a]void jurisdictional competition and conflict . . . in matters of child custody[.]” *Id.* § 50A-101 cmt.; *see also Foley*, 156 N.C. App. at 411, 576 S.E.2d at 385. A party’s failure to provide a certified copy of a foreign child-custody order will necessarily affect whether a North Carolina court has jurisdiction, which cannot be waived. As our Supreme Court has regularly observed, “a court’s lack of subject[-]matter jurisdiction is not waivable and can be raised at any time.” *In re S.E.*, \_\_\_ N.C. at \_\_\_, 838 S.E.2d at 331 (citation omitted).

We reiterate that “the jurisdictional requirements of the UCCJEA must be met for a court to have power to adjudicate child[-]custody disputes.” *Foley*, 156 N.C. App. at 411, 576 S.E.2d at 385 (citation omitted). The failure to submit certified copies of the orders Father wished to have enforced in North Carolina pursuant to the UCCJEA—which requires, *inter alia*, that “[c]ertified copies of all orders sought to be enforced and of any order confirming registration must be attached to the petition”—strips the trial court of subject-matter jurisdiction to hear the matter. N.C. Gen. Stat. § 50A-308(a). Thus, the trial court could not enforce the Shar’ia Court’s child-custody determinations.

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Because we conclude that Father did not properly invoke the subject-matter jurisdiction of the trial court, we need not address Mother's remaining arguments on appeal.

**Conclusion**

For the reasons stated herein, the trial court's orders are void. *See Carter v. Rountree*, 109 N.C. 29, 32, 13 S.E. 716, 717 (1891) ("A void [order] is one that has merely semblance, without some essential element or elements, as when the court purporting to render it has not jurisdiction."). "[L]ike any other void judgment[s]," these orders are nullities, *Cunningham v. Brigman*, 263 N.C. 208, 211, 139 S.E.2d 353, 355 (1964), and "[e]*x nihilo nihil fit* is one maxim that admits of no exceptions[.]" *Harrell v. Welstead*, 206 N.C. 817, 819, 175 S.E. 283, 285 (1934). Accordingly, we vacate the order confirming registration of the petition, as well as the order enforcing the Shar'ia Court's custody determinations.

VACATED.

Chief Judge McGEE and Judge ARROWOOD concur.

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KIDD CONSTRUCTION GROUP, LLC, ROCKY RUSSELL BUILDERS, INC.,  
AND TOMMY WILLIAMS BUILDERS, LLC, PLAINTIFFS  
v.  
GREENVILLE UTILITIES COMMISSION, DEFENDANT

No. COA19-910

Filed 19 May 2020

**Utilities—water and sewer—impact fees—authority to assess under utility commission's charter**

Where, prior to the passage of the Public Water and Sewer System Development Act, defendant utility commission's charter granted the authority to set fees for services rendered but contained no language authorizing fees for services to be rendered, defendant had the power to charge for contemporaneous use of its water and sewer systems but not to charge for future services. Therefore, defendant did not have the authority to charge impact fees to plaintiff developers and the charging of such fees was *ultra vires*.

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Appeal by Plaintiffs from order entered 3 June 2019 by Judge Lamont Wiggins in Pitt County Superior Court. Heard in the Court of Appeals 28 April 2020.

*Whitfield, Bryson, and Mason, LLP, by Daniel K. Bryson, Martha A. Geer, Scott C. Harris, and J. Hunter Bryson, for Plaintiffs-Appellants.*

*Hartzog Law Group, LLC, by Dan M. Hartzog, Jr., and Katherine Barber-Jones, for Defendant-Appellee.*

BROOK, Judge.

Kidd Construction Group, LLC, Rocky Russell Builders, Inc., and Tommy Williams Builders, Inc. (collectively “Plaintiffs”) appeal from the trial court’s order entering summary judgment in favor of Greenville Utilities Commission (“Defendant” or “GUC”). On appeal, Plaintiffs argue that Defendant lacked the authority to charge impact fees for water and sewer services and that the charging of such fees is *ultra vires*. Plaintiffs argue that the trial court erred in concluding otherwise and that we must reverse the trial court’s order. For the following reasons, we agree with Plaintiffs.

### I. Factual and Procedural Background

The North Carolina General Assembly created GUC, a local government entity (“LGE”) in 1991 by passing Session Law 1991-861, “An Act to Amend and Restate the Charter of the Greenville Utilities Commission of the City of Greenville” (the “Charter”). The bill delegated power to GUC for “the proper management of the public utilities of the City of Greenville,” including “electric, natural gas, water, and sewer services[.]” GUC provides water and sewer services to all of Pitt County.

GUC’s Charter states in pertinent part:

Sec. 5. The Greenville Utilities Commission shall have entire supervision and control of the management, operation, maintenance, improvement, and extension of the public utilities of the City, which public utilities shall include electric, natural gas, water, and sewer services, and shall fix uniform rates for all services rendered[.] . . .

Sec. 6. The Greenville Utilities Commission shall employ a competent and qualified General Manager whose duties shall be to supervise and manage the said public

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utilities, subject to the approval of the Greenville Utilities Commission. The General Manager, under the direction of and subject to the approval of the Greenville Utilities Commission, shall cause the said utilities to be orderly and properly conducted; the General Manager shall provide for the operation, maintenance, and improvement of utilities; the General Manager shall provide for the extension of all utilities, except sewer extensions made beyond the area regulated by the City of Greenville are subject to the approval of the City Council, and shall furnish, on application, proper connections and service to all citizens and inhabitants who make proper application for the same, and shall in all respects provide adequate service for the said utilities to the customers thereof; the General Manager shall attend to all complaints as to defective service and shall cause the same to be remedied, and otherwise manage and control said utilities for the best interests of the City of Greenville and the customers receiving service, and shall provide for the prompt collection of all rentals and charges for service to customers and shall promptly and faithfully cause said rentals and charges to be collected and received, all under such rules and regulations as the Greenville Utilities Commission shall, from time to time, adopt and in accordance with the ordinances of the City of Greenville in such case made and provided.

Sec. 7. All monies accruing from the charges or rentals of said utilities shall be deposited into the appropriate enterprise fund of the Greenville Utilities Commission and the Greenville Utilities Commission's Director of Finance shall keep an account of the same. . . . [T]he Greenville Utilities Commission shall pay out of its receipts the costs and expense incurred in managing, operating, improving, maintaining, extending, and planning for future improvements and expansions of said utilities; provided, however, that should the funds arising from the charges and rentals of said utilities be insufficient at any time to pay the necessary expenses for managing, operating, improving, and extending said utilities, then and in that event only, the City Council of the City of Greenville shall provide and pay into the appropriate enterprise fund of the Greenville Utilities Commission a sum sufficient, when

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added to the funds that have accrued from the rents and charges, to pay the costs and expenses of managing, operating, improving, maintaining, extending, and planning for future improvements and expansions of said utilities[.]

An Act to Amend and Restate the Charter of the Greenville Utilities Commission of the City of Greenville, ch. 861, §§ 5-7, 1992 N.C. Sess. Law 370, 373-74 (hereinafter “S.L. 1991-861”).

Starting in 2008, at the time of a developer’s application for water and sewer service, GUC began requiring contractors and developers of new construction and new developments to pay service connection fees, which consist of two components: a tapping fee and a capacity fee. The tapping fee recovers the cost for physically making a service tap. Capacity fees, or impact fees, are collected in an effort to “recover a proportional share of the cost of capital facilities constructed to provide service capacity for new development or new customers connecting to the water/sewer system.” Capacity fees are imposed as a precondition to development approval, to the issuance of building permits, and to receiving service.

In 2016, our Supreme Court decided *Quality Built Homes v. Town of Carthage*, 369 N.C. 15, 789 S.E.2d 454 (2016) (“*Quality Built Homes I*”), which examined the Town of Carthage’s authority to impose impact fees on developers as a precondition for the issuance of building permits. The Court concluded that municipalities, including Carthage, did not have the statutory authority to impose impact fees for future services. *Id.* at 20-21, 789 S.E.2d at 458. Subsequent appeals led our Supreme Court to hold that a municipality’s liability to refund unlawful impact fee revenue was subject to a three-year statute of limitations. *Quality Built Homes v. Town of Carthage*, 371 N.C. 60, 74, 813 S.E.2d 218, 228-29 (2018) (“*Quality Built Homes II*”).

In response to our Supreme Court’s holding in *Quality Built Homes I*, on 20 July 2017 the General Assembly enacted the Public Water and Sewer System Development Fee Act (“the Act” or “System Development Fee Act”) to clarify a local government utility’s authority to assess upfront charges for water and sewer services. S.L. 2017-138, 2017 N.C. Sess. Laws 996, 996-1002 (codified at N.C. Gen. Stat. § 162A-200–215 (2019)). The law grants local government utilities specific authority to assess one type of upfront charge—a system development fee—as long as that fee is calculated in accordance with the statute’s “written analysis” process. N.C. Gen. Stat. § 162A-205 (2019). The Act became effective on 1 October 2017, providing, “Nothing in this

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act provides retroactive authority for any system development fee, or any similar fee for water or sewer services to be furnished, collected by a local government unit prior to October 1, 2017.” S.L. 2017-138 § 11.

After the legislature passed the System Development Fee Act, GUC hired Raftelis Financial Consultants, Inc. (“Raftelis”), an independent financial consultant, to perform the financial study required by N.C. Gen. Stat. § 162A-205. GUC adopted Raftelis’s new fee calculation system, which became effective on 1 July 2018.

Plaintiffs are North Carolina licensed general contractors who work in and around the Greenville, North Carolina area. Plaintiffs initiated a class action suit on 24 April 2018, alleging that Defendant lacked the authority to collect impact fees from the three years prior to the commencement of the action, and thus within the three-year statute of limitations period, and sought recovery of all impact fees paid within that time period—totaling \$1.2 million dollars. Defendant filed a motion for summary judgment on 4 March 2019 contending that its Charter authorized GUC to collect impact fees prior to the enactment of the System Development Act. On 20 May 2019, Judge Lamont Wiggins heard arguments on Defendant’s motion for summary judgment and entered an order granting summary judgment in favor of Defendant on 3 June 2019.

Plaintiffs timely noticed appeal.

## II. Analysis

On appeal, Plaintiffs argue that the trial court erred by granting Defendant’s motion for summary judgment because GUC’s Charter does not specifically authorize GUC to charge impact fees for future water and sewer services. Plaintiffs further argue that GUC’s Charter only authorizes the charging of uniform rates and charges, not impact fees. Finally, Plaintiffs argue that the charging of impact fees is outside the authority of GUC because these fees are not reasonably necessary or expedient to carry GUC’s express powers into execution and effect.

After careful review, we conclude that GUC does not possess the authority to charge impact fees and that the charging of such fees was *ultra vires*. We therefore do not reach Plaintiffs’ arguments in the alternative.

### A. Standard of Review

“Summary judgment is properly granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

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material fact and that any party is entitled to a judgement as a matter of law.” *Campbell v. Duke Univ. Health Sys, Inc.*, 203 N.C. App. 37, 42, 691 S.E.2d 31, 35 (2010) (citations and marks omitted). This Court reviews a trial court’s ruling on summary judgment de novo. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). “The *de novo* standard also applies to questions of statutory interpretation.” *JVC Enters., LLC v. City of Concord*, \_\_ N.C. App. \_\_, \_\_, 837 S.E.2d 206, 209 (2019). “Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal marks omitted).

**B. Merits**

“The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent.” *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990). “The best indicia of that intent are the language of the statute . . . , the spirit of the act[,] and what the act seeks to accomplish.” *Coastal Ready-Mix Concrete Co., Inc. v. Bd. of Comm’rs*, 299 N.C. 620, 629, 265 S.E.2d 379, 385 (1980). Thus, “[i]n resolving issues of statutory construction, we look first to the language of the statute itself.” *Walker v. Bd. of Tr. of the N.C. Local Gov’t. Emp. Ret. Sys.*, 348 N.C. 63, 65, 499 S.E.2d 429, 430 (1998) (citation omitted). “When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required.”<sup>1</sup> *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006).

Our Supreme Court’s holding in *Quality Built Homes I* is instructive in the case at hand by providing the framework with which we interpret GUC’s Charter. In holding that the Town of Carthage lacked the statutory authority to charge prospective fees for water and sewer services, our Supreme Court compared the language of the North Carolina Water and Sewer Authorities Act governing county water and sewer districts with the Public Enterprise Statutes governing cities and towns. 369 N.C. at 20, 789 S.E.2d at 458. The enabling statutes for water and sewer districts included the language “services furnished and *to be furnished*”

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1. The rules of statutory construction are equally applicable when analyzing a local act of the General Assembly like GUC’s charter. See, e.g., *Lanvale Props., LLC v. Cty. of Cabarrus*, 366 N.C. 142, 164, 731 S.E.2d 800, 815 (2012) (“[a]pplying these rules of statutory construction” when analyzing whether a session law conferred certain authority to a county).



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and thus “plainly allowed the charge for prospective services, which are *not* limited to the financing of maintenance and improvements of *existing* customers[.]” *Id.* (emphasis in original) (citations and marks omitted). The enabling statutes for municipalities, on the other hand, provided that “[a] city may establish and revise . . . rents, rates, fees, charges, and penalties for the use of or the *services furnished* by any public enterprise,” *id.* (quoting N.C. Gen. Stat. § 160A-314(a) (2015)) (emphasis added), “[a] city shall have authority to acquire, construct, establish, enlarge, improve, maintain, own, operate, and contract for the operation of any or all of the public enterprises . . . to furnish services,” *id.* (quoting § 160A-312(a)), “and that ‘a city shall have full authority to finance the cost of any public enterprise by levying taxes, borrowing money, and appropriating any other revenues therefor,’” *id.* (quoting § 160A-313).

The Court held that “[t]hese enabling statutes clearly and unambiguously empower Carthage to charge for the contemporaneous use of water and sewer services—not to collect fees for future discretionary spending” because “[a] municipality’s ability to establish and revise its various fees is limited to the use of or the *services furnished* by the enterprise, which provisions are operative in the present tense.” *Id.* at 20, 789 S.E.2d at 458 (emphasis added) (internal marks omitted). “[U]nlike similar county water and sewer district enabling statutes, the language at issue here fails to authorize Carthage to charge for services ‘to be furnished.’” *Id.* (emphasis in original). “While the enabling statutes allow Carthage to charge for contemporaneous use of its water and sewer systems, the plain language of the Public Enterprise Statutes clearly fails to empower the Town to impose impact fees for future services.” *Id.* at 19-20, 789 S.E.2d at 458.

Here, the language in GUC’s Charter is nearly identical to that at issue in *Quality Built Homes I*. Section 5 of the Charter provides that

The Greenville Utilities Commission shall have entire supervision and control of the management, operation, maintenance, improvement, and extension of the public utilities of the City, which public utilities shall include electric, natural gas, water, and sewer services, and shall fix uniform rates for all *services rendered*[.] . . .

S.L. 1991-861 § 5 (emphasis added). Not only is “services rendered” functionally equivalent to *Quality Built Homes I*’s “services furnished,”<sup>2</sup> it

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2. “To furnish” means “to provide with what is needed” or to “supply, give,” *Furnish*, *Merriam-Webster Dictionary*, <https://www.merriam-webster.com/dictionary/furnish> (last



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also fails to confer prospective charging authority by lacking the critical “to be” language. *Compare JVC Enters., LLC*, \_\_\_ N.C. App. at \_\_\_, 837 S.E.2d at 210 (holding that the language “furnished or to be furnished” authorized the levying of prospective fees), *with Quality Built Homes I*, 369 N.C. at 20-21, 789 S.E.2d at 458 (holding that the Public Enterprise Statutes lacked “the essential ‘to be’ language.”). The impact fees at issue here were not charged for contemporaneous services but for future services and therefore required prospective charging power. Just as the “services furnished” language did not empower Carthage to impose impact fees prior to any service being provided, so too does “services rendered” fail to empower GUC to impose impact fees on builders and developers as a condition of final development approval. *See id.* at 22, 179 S.E.2d at 459.

Defendant argues that when sections 5, 6, and 7 of the Charter are read together, GUC possesses the requisite authority to charge impact fees. Defendant argues that the Charter specifically authorizes GUC to “collect[] . . . rentals and charges for service to customers,” S.L. 1991-861 § 6, and to pay out of such receipts “the cost and expense incurred in managing, operating, improving, maintaining, extending, and planning for future improvements and expansions of said utilities[.]” *id.* § 7. According to Defendant “such language clearly authorizes the collection of fees for future use, in contrast to the language analyzed in *Quality Built Homes*.”

While section 5’s “services rendered” is not the only reference to GUC’s charging authority in the Charter, references elsewhere do not countenance more expansive authority. Section 6, for instance, speaks of GUC’s charging authority in terms of “the customers receiving service,” not customers who *may* receive service. S.L. 1991-861 § 6; *see also Dunn v. Pac. Emp’rs Ins. Co.*, 332 N.C. 129, 134, 418 S.E.2d 645, 648 (1992) (“Ordinary rules of grammar apply when ascertaining the meaning of a statute[.]”). It goes on to authorize GUC to “pay out of its receipts the cost and expense incurred in managing, operating, improving, maintaining, extending, and planning for future improvements and expansions of said utilities[.]” S.L. 1991-861 § 7, but “rentals and charges for service to customers”—operative in the present tense—form the bases for these “receipts,” *not* rentals and charges for service *to be provided*

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visited 1 May 2020), while “to render” means “to transmit or deliver,” *Render*, *Black’s Law Dictionary* (11th ed. 2019); *see also Fid. Bank v. N.C. Dep’t of Revenue*, 370 N.C. 10, 19, 803 S.E.2d 142, 149 (2017) (“In the event that the General Assembly uses an unambiguous word without providing an explicit statutory definition, that word will be accorded its plain meaning.”).

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to customers or to customers who *may be served*. See *Quality Built Homes I*, 369 N.C. at 20, 283 S.E.2d at 458; see also *JVC Enters., LLC*, \_\_\_ N.C. App. at \_\_\_, 837 S.E.2d at 209-10 (charter authorized charging of fees “to be paid by the owner, tenant[,], or occupant of each lot or parcel of land which *may be served* by such electrical, sewer[,], and water facilities[.]”) (emphasis in original). Moreover, Defendant’s argument is indistinguishable from that which our Supreme Court rejected in *Quality Built Homes I*. 369 N.C. at 19, 789 S.E.2d at 458 (“Carthage asserts that . . . it has broad authority to ‘collect monies’ for the ‘operation, maintenance and expansion’ of its water and sewer systems, and that such authority extends to the collection of impact fees.”). As in *Quality Built Homes I*, GUC’s Charter “clearly and unambiguously empower[s] [GUC] to charge for the contemporaneous use of water and sewer services—not to collect fees for future discretionary spending” on water and sewer expansion projects. *Id.*

While the legislature could have included language like “services to be rendered” or “services which may be rendered[,],” or other similar prospective language in GUC’s Charter, it did not. And, as our Supreme Court noted in *Quality Built Homes I*, other municipalities had previously sought specific legislative authority to assess impact fees that the Town of Carthage had not. *Id.* at 21, 789 S.E.2d at 459 (citing An Act to Allow the Town of Rolesville to Impose Impact Fees, ch. 996, § 1, 1987 N.C. Sess. Law 178, 178 (enabling Rolesville to “provide by ordinance for a system of impact fees”); An Act Making Sundry Amendments Concerning Local Governments in Orange and Chatham Counties, ch. 460, § 14.1, 1987 N.C. Sess. Laws 609, 613 (same for Pittsboro); An Act to Make Omnibus Amendments Concerning Local Governments in Orange and Chatham Counties, ch. 936, § 5.34, 1985 N.C. Sess. Laws 221, 221 (same for Chapel Hill)). The language in these special acts specifically authorized the charging of “impact fees to be paid by developers,” see, e.g., S.L. 1985-936 § 5.34(a), while GUC’s Charter, enacted two to six years after those acts cited above, does not use such language, see *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) (“It is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law.”). As Plaintiffs noted in their brief to this Court, “If the General Assembly had intended to grant the same powers to GUC as it had previously granted to cities and towns like Chapel Hill, Rolesville, and Pittsboro, it easily could have done so by using the same language in the GUC Charter.”

Though GUC’s Charter allows it to charge for “services rendered,” “the language at issue here fails to authorize [GUC] to charge for services *to be* [rendered].” *Quality Built Homes I*, 369 N.C. at 20, 789 S.E.2d

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at 458 (emphasis in original). While the Charter “clearly and unambiguously” empowers GUC “to charge for contemporaneous use of its water and sewer systems,” it does not contemplate charges for future services. *Id.* And, though the Charter authorizes GUC to pay out its receipts for “extending[] and planning for future improvements and expansions of said utilities,” S.L. 1991-861 § 7, that does not change the limited sources through which those receipts can originate—contemporaneous use. The impact fees charged by GUC were for future services and, therefore, not authorized by the Charter.

**III. Conclusion**

For the above stated reasons, we hold that the trial court erred in granting summary judgment in favor of Defendant.

REVERSED AND REMANDED.

Judges BRYANT and YOUNG concur.

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KIM AND BARRY LIPPARD, PLAINTIFFS

v.

LARRY HOLLEMAN AND ALAN HIX, DEFENDANTS

No. COA18-873

Filed 19 May 2020

**Constitutional Law—First Amendment—defamation claims—ecclesiastical entanglement doctrine**

In a dispute between a church pianist and governing members of her church in which plaintiffs (the pianist and her husband) alleged multiple oral and written statements regarding the extent to which the pianist engaged in the church’s prescribed reconciliation process were defamatory, resolution of those claims was barred by the ecclesiastical entanglement doctrine of the First Amendment where determination of the communications’ falsity would require the interpretation of the church’s internal governance mechanisms and church doctrine.

Chief Judge McGEE concurring in part, dissenting in part, and concurring in the judgment.

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Appeal by Plaintiffs from order entered 17 April 2018 by Judge Mark E. Klass in Iredell County Superior Court. Heard in the Court of Appeals 14 March 2019.

*Seth B Weinshenker, P.A., by Seth B. Weinshenker, for plaintiffs-appellants.*

*Gibbs & Associates Law Firm, LLC, by Seth J. Kraus and E. Bedford Cannon, for defendants-appellees.*

MURPHY, Judge.

Kim Lippard (“Mrs. Lippard”) and Barry Lippard (“Mr. Lippard”) (together, “Plaintiffs”) allege multiple claims of defamation against Larry Holleman (“Holleman”) and Alan Hix (“Hix”) (together, “Defendants”). The First Amendment does not permit courts to hear defamation claims when they were made during an internal religious dispute regarding ecclesiastical matters. We affirm the trial court’s grant of summary judgment in favor of Defendants.

**BACKGROUND**

Plaintiffs were members of Diamond Hill Baptist Church (“DHBC”), where Mrs. Lippard had served as church pianist and vocalist. Holleman was the Pastor of the Church and Hix was Minister of Music. Holleman was DHBC’s leader and was “responsible for leading [DHBC] to function as a New Testament Church.” This included leading the congregation and DHBC staff to perform their tasks and caring for the DHBC members. Hix directed DHBC’s music organization. Its purpose was “to teach music, train persons to lead, sing, and play music, [and] provide music in the [DHBC] and community.” Under Hix’s direction, the music organization “provide[d] and interpret[ed] information regarding the work of the [DHBC] and denomination.”

On 8 August 2012, Mrs. Lippard and Hix had a disagreement over the reassignment of a music solo. The solo was originally assigned to Mrs. Lippard for an upcoming Sunday morning service. Hix, however, asked another choir member to perform the solo and Mrs. Lippard was upset about the reassignment. When an internal conflict between church members arises, DHBC’s bylaws maintain that “the pastor and the deacons will take every reasonable measure to resolve the problem in accord with Matthew 18.”

As church leader, Holleman began meeting with Mrs. Lippard and Hix to facilitate a “reconciliation” between them and an “improved

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relationship based on biblical passages.” On 26 August 2012, after several unsuccessful reconciliation meetings, Holleman met with the Board of Deacons (“Deacons”) to discuss whether Mrs. Lippard should be dismissed from her position as DHBC pianist. At the meeting, the Deacons voted to recommend Mrs. Lippard’s dismissal to DHBC’s Church Personnel Committee (“the Personnel Committee”). Three days later, Holleman informed Mrs. Lippard that the Deacons had voted to recommend her dismissal.

In response to a voice message from Mr. Lippard, Holleman arranged further counseling sessions between Mrs. Lippard and Hix. The sessions were to continue seeking a “reconciliation” between the two and were scheduled for late September through October 2012.

Ultimately, the Deacons announced its decision to again recommend Mrs. Lippard’s dismissal and re-submitted its recommendation to the Personnel Committee. The Personnel Committee met and voted to recommend to the full congregation that Mrs. Lippard be dismissed as DHBC pianist. The decision had to be approved by an affirmative vote of three-fourths of DHBC members. On 13 November 2012, Holleman delivered a letter to Mrs. Lippard, setting forth the reasons for his recommendation to dismiss her as pianist.<sup>1</sup>

On 25 November 2012, during the morning DHBC church service, Holleman announced to his congregation that there would be a “church-wide” meeting and a vote in three days. At that meeting, DHBC staff would be discussed and it was part of the responsibilities of members to be present for the discussion and to vote. He also said that a written letter explaining a motion and absentee ballots for the motion would be made available.

At the “church-wide” meeting on 28 November 2012, Holleman delivered a sermon on the motion to terminate Mrs. Lippard from the pianist position. He repeatedly stated that the recommendation for Mrs. Lippard’s dismissal stemmed from her “unwillingness to commit” to the DHBC’s reconciliation process. After the meeting, Holleman left printed copies of his 28 November 2012 sermon in the foyer for members of the congregation. He also made a letter available titled “Concluding Comments to the Present disciplinary Actions by The Body of Deacons and the Personnel Committee (November 13, 2012).” It said, “I (we)

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1. Although the 13 November letter Holleman sent to Mrs. Lippard is not included in the Record, Plaintiffs assert the 13 November letter is a shortened version of a 28 November 2012 letter made available to the full DHBC congregation, which is included in the Record. Defendants do not contest this assertion.

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have yet to hear you acknowledge any personal responsibility for your failures.” The letter concluded that Mrs. Lippard, “by placing conditions upon [her] obedience to the scriptures as they regard reconciliation, ha[s] been the obstacle to that reconciliation.”

In a sermon on 2 December 2012, Holleman advocated for the DHBC congregation to remove Mrs. Lippard from the pianist position. Ballots were distributed stating the Deacons recommended the dismissal of Mrs. Lippard “due to her unwillingness to admit to any wrongdoing, or to commit unconditionally to the process of reconciliation.” The congregation voted against dismissal, and Mrs. Lippard remained in her position. Holleman and Hix also continued in their respective leadership positions.

Plaintiffs allege that, after the vote, Holleman and the Deacons unsuccessfully sought to remove them as members of DHBC, and that Defendants continued to speak with members of the congregation about Plaintiffs. Plaintiffs contend that in Holleman’s sermons he “continued . . . to defame [Plaintiffs] by consistently preaching against those who would not commit to reconciliation,” alluding to Plaintiffs. Plaintiffs further contend Hix said to a DHBC member that “[Mr.] Lippard is a liar and you and other people like you are believing him instead of the Scripture.” On 8 January 2013, Hix also emailed DHBC member Tony Brewer (“Brewer”) about the situation, stating Plaintiffs were “openly denying” “verifiable facts” about the reconciliation process.

Holleman also communicated with others about Plaintiffs. When Brewer complained of the efforts to remove Plaintiffs, Holleman sent a letter to him alleging that Mrs. Lippard “refuses to acknowledge any wrongdoing, and that she was unwilling to commit unconditionally to the process of reconciliation.” In a 6 April 2013 email, Holleman claimed Mr. Lippard once “blocked [Hix’s] exit from the music room and was aggressively going after [Hix], pointing his finger in [Hix]’s face, an action [Holleman] recently learned was illegal and could have very well been reported as a crime.” Holleman also emailed DHBC member A.W. Myers (“Myers”), stating Mrs. Lippard failed to acknowledge her own role in the dispute between her and Hix. In August 2013, Mrs. Lippard resigned her position as DHBC pianist and Plaintiffs began attending another church.

**A. Unpublished Lippard**

Shortly after Mrs. Lippard’s resignation, Plaintiffs filed this action against DHBC and Defendants, alleging they were defamed by Defendants, who Plaintiffs also allege committed *ultra vires* corporate

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activities. In their answer, Defendants moved to dismiss Plaintiffs' complaint under N.C.G.S. § 1A-1, Rule 12(b)(1) for lack of subject matter jurisdiction. Plaintiffs voluntarily dismissed their claim against DHBC without prejudice, leaving only their claims against Defendants. Defendants' Rule 12(b)(1) motion to dismiss was denied by Judge Anna Mills Wagoner on 25 May 2014. Defendants later moved to dismiss Plaintiffs' second cause of action for *ultra vires* activities, and Judge Theodore Royster granted Defendants' motion, leaving only the claims for defamation against Defendants.

After retaining new counsel, Plaintiffs filed a separate civil action (No. 15-CVS-606) against Defendants and DHBC upon nearly identical claims of defamation, *ultra vires* activities, and negligent supervision while the claims in the 2013 case were still active. Defendants moved to dismiss the claims in No. 15-CVS-606 and made an oral motion to dismiss the claims in this case as well. Judge Michael Duncan dismissed the claims in No. 15-CVS-606 while refusing to rule on Defendants' oral motion to dismiss the claims in this case, finding that Judge Wagoner had previously ruled on that issue.

Defendants filed an additional motion to dismiss Plaintiffs' remaining defamation claims in this case on 16 February 2016 for lack of subject matter jurisdiction under N.C.G.S. § 1A-1, Rule 12(b)(1) and failure to state a claim upon which relief can be granted under N.C.G.S. § 1A-1, Rule 12(b)(6). Judge Martin B. McGee heard the motion on 21 March 2016 and dismissed Plaintiffs' defamation claim in an order, stating "[t]he First Amendment deprives the [c]ourt of jurisdiction to resolve this dispute involving internal communications between church leadership and members of the congregation relating to issues of membership and music leadership."

Plaintiffs appealed and we vacated and remanded the judgment to the trial court in an unpublished opinion. *Lippard v. Holleman*, No. COA16-886, 253 N.C. App. 407, 798 S.E.2d 812, 2017 WL 1629377, at \*3 (2017) (unpublished) (hereinafter *Unpublished Lippard*).<sup>2</sup> In vacating and remanding the trial court's dismissal of Plaintiffs' claims under Rule 12(b)(1), we held that Judge McGee's grant of Defendants' motion to dismiss impermissibly overruled Judge Wagoner's denial of Defendants' motion to dismiss in the same action. We reasoned subject matter jurisdiction is not an exception to the general rule that "one Superior Court judge may not correct another's errors of law; and . . . ordinarily one judge

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2. Our recognition of the law of this case does not convert the holding in our previously unpublished opinion into binding precedent. See Rule 30(e).



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may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.” *Unpublished Lippard*, 2017 WL 1629377, at \*3 (quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972)) (internal quotations omitted). We further held that none of the recognized exceptions to the *Calloway* rule applied. *See id.* at \*5. Although we discussed jurisdiction and the ecclesiastical entanglement doctrine under the First Amendment in dicta, our opinion did not reach the merits of the issue currently before us.

**B. Decision on Remand**

On remand to the trial court, Defendants filed a motion for summary judgment under N.C.G.S. § 1A-1, Rule 56, stating there was no genuine issue as to any material fact and they were entitled to judgment as a matter of law. Judge Mark E. Klass granted Defendants’ motion on the following grounds: (1) the First Amendment barred Plaintiffs’ claims because “inquiry into the falsity of the claimed ‘defamatory statements’ would cross the ecclesiastical limitations prohibited by the First Amendment”; (2) “Defendants are entitled to judgment as a matter of law in their individual capacities” because Plaintiffs “failed to raise any forecast of evidence that Defendants made any of their statements in their individual capacities”; (3) Defendants are entitled to judgment as a matter of law in their representative capacities because Plaintiffs voluntarily dismissed Defendants’ principal, DHBC; (4) none of Defendants’ statements were defamatory *per se* as a matter of law; and (5) Plaintiffs failed to “provide any evidentiary forecast that they suffered special damages because of any of Defendants’ allegedly defamatory *per quod* statements.” Plaintiffs appealed.

**ANALYSIS**

Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56(c) (2017). “We review a trial court’s order granting or denying summary judgment *de novo*.” *Craig ex rel. Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 353 (2009) (internal citations omitted).

“Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute.” *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). “The question of subject matter jurisdiction may be raised at any time . . .” *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 85 (1986). “It is a



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universal rule of law that parties cannot, by consent, give a court, as such, jurisdiction over subject matter of which it would otherwise not have jurisdiction. Jurisdiction in this sense cannot be obtained by consent of the parties, waiver, or estoppel.” *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961) (quoting *Hart v. Thomasville Motors, Inc.*, 244 N.C. 84, 88, 92 S.E.2d 673, 676 (1956)).

**A. First Amendment Ecclesiastical Entanglement Doctrine**

Plaintiffs argue the trial court erred in granting summary judgment to Defendants for lack of subject matter jurisdiction on First Amendment grounds. According to Plaintiffs, their defamation claims do not require the trial court to impermissibly weigh church doctrine because “it is the conduct of [Defendants] in carrying on reconciliation proceedings and defaming [Plaintiffs] in the course of such proceedings, *and not the reconciliation proceeding itself*, that is at issue.” In contrast, Defendants argue the trial court correctly held that the defamation claim is barred under the ecclesiastical entanglement doctrine because, to determine whether the alleged defamatory statements were false, courts would “becom[e] entangled in the statements made during the course of [DHBC]’s religious disciplinary and administrative activities between the Lippards, Holleman, Hix, and members and choir members of DHBC.” We hold that determining the truth or falsity of Defendants’ alleged defamatory statements—where the content of those statements concerns whether Plaintiffs complied with DHBC’s practices—would require us to interpret or weigh ecclesiastical matters, an inquiry not permitted by the First Amendment.

“The Establishment Clause and the Free Exercise Clause of the First Amendment prohibit any ‘law respecting an establishment of religion, or prohibiting the free exercise thereof.’ ” *Doe v. Diocese of Raleigh*, 242 N.C. App. 42, 47, 776 S.E.2d 29, 34 (2015) (quoting U.S. Const. amend. I.). “As applied to the states through the Fourteenth Amendment, the First Amendment also restricts action by state governments and the servants, agents and agencies, of state governments.” *Hill v. Cox*, 108 N.C. App. 454, 461, 424 S.E.2d 201, 206 (1993) (citation and quotation marks omitted). There is “a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, *free from state interference*, matters of church government as well as those of faith and doctrine.” *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116, 97 L. Ed. 120 (1952) (emphasis added). “For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its

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respective sphere.” *McCollum v. Bd. of Ed.*, 333 U.S. 203, 212, 92 L. Ed. 649 (1948). We “are prohibited ‘from becoming entangled in ecclesiastical matters’ and have no jurisdiction over disputes which require an examination of religious doctrine and practice in order to resolve the matters at issue.” *Doe*, 242 N.C. App. at 47, 776 S.E.2d at 34-35 (quoting *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 510, 714 S.E.2d 806, 810 (2011)).

An ecclesiastical matter is one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decision will be respected by civil tribunals.

*Doe*, 242 N.C. App. at 47, 776 S.E.2d at 35 (quoting *E. Conference of Original Free Will Baptists of N.C. v. Piner*, 267 N.C. 74, 77, 147 S.E.2d 581, 583 (1966), *overruled in part on other grounds by Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973)). Hearing disputes over these matters is prohibited because of two concerns: “(1) by hearing religious disputes, a civil court could influence associational conduct, thereby chilling the free exercise of religious beliefs; and (2) by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks ‘establishing’ a religion.” *Id.* at 48, 776 S.E.2d at 35 (internal quotation marks omitted) (quoting *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 492, 598 S.E.2d 667, 670 (2004)).

These dangers demand dismissal “when ‘no neutral principles of law exist to resolve claims’ so that [a] court can ‘avoid becoming impermissibly entangled in the dispute[.]’” *Id.* at 58, 776 S.E.2d at 41 (alterations omitted) (quoting *Harris v. Matthews*, 361 N.C. 265, 273, 643 S.E.2d 566, 571 (2007)). This necessitates an answer to a “dispositive question[:] whether resolution of the legal claim requires the court to interpret or weigh church doctrine.” *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998) (citing *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 710, 49 L. Ed. 2d 151, 163 (1976)). Only when an “issue to be determined in connection with [a party’s] claim is a *purely secular* one,” then “[n]eutral principles of law govern th[e] inquiry and . . . subject matter jurisdiction exists in the trial court over th[e] claim.” *Doe*, 242 N.C. App. at 55, 776 S.E.2d at 39 (emphasis added);

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*see also Smith v. Raleigh Dist. of N.C. Conference of United Methodist Church*, 63 F. Supp. 2d 694, 713 (E.D.N.C. 1999) (holding that “[a] court must determine whether the dispute is an ecclesiastical one about discipline, faith, internal organization, or ecclesiastical rule, custom or law, or whether it is a case in which it should hold religious organizations liable in civil courts for purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization”) (internal marks and citations omitted).

In *Harris*, our Supreme Court reaffirmed the importance of avoiding entanglement in matters such as ecclesiastical governance, doctrine, practice, questions, roles of officials, and internal decision-making. *Harris v. Matthews*, 361 N.C. 265, 271-73, 643 S.E.2d 566, 570-572 (referencing *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710, 49 L. Ed. 2d 151, 163 (1976); *Md. & Va. Eldership of Churches of God v. Church of God at Sharpsburg, Inc.*, 396 U.S. 367, 368, 24 L. Ed. 2d 582, 583 (1970) (per curiam); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440, 449, 21 L. Ed. 2d 658, 665 (1969)). The Supreme Court concluded that

[w]hen a party brings a proper complaint, where civil, contract, or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules. But when a party challenges church actions *involving religious doctrine and practice*, court intervention is constitutionally forbidden.

*Harris*, 361 N.C. at 274–75, 643 S.E.2d at 572 (internal marks and citations omitted) (emphasis added).

Although our courts have not previously decided whether the ecclesiastical entanglement doctrine applies to defamation claims, “the principles set out [in *Harris*] concerning the limitations placed by the First Amendment on the subject matter jurisdiction of civil courts to adjudicate claims against religious entities are equally applicable here.” *Doe*, 242 N.C. App. at 49, 776 S.E.2d at 36. Again, “[t]he dispositive question is whether resolution of the legal claim[s] requires the court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim.” *Id.* at 49, 776 S.E.2d at 36 (alteration in original) (quoting *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398, *appeal dismissed*, 348 N.C. 284, 501 S.E.2d 913 (1998)). Defamation claims present a unique challenge under this doctrine because, in North Carolina, as

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in other states, these claims include as an essential element the falsity of the defendant's alleged statements. *See Parker v. Edwards*, 222 N.C. 75, 78, 21 S.E.2d 876, 878-89 (1942) ("It may be stated as a general rule . . . that a defamatory statement, to be actionable, must be false.").

*Harris* maintains that our courts must avoid entanglement in ecclesiastical matters, doctrine, and practice. *See Harris*, 361 N.C. at 269-75, 643 S.E.2d at 569-72. Not only do we dismiss claims that involve examining or weighing *doctrine*, but we also dismiss claims that involve examining or weighing *ecclesiastical matters*. *Doe*, 242 N.C. App. at 46-58, 776 S.E.2d at 34-41; *see Harris*, 361 N.C. at 270, 643 S.E.2d at 569 ("The constitutional prohibition against court entanglement in ecclesiastical matters is necessary to protect First Amendment rights identified by the 'Establishment Clause' and the 'Free Exercise Clause.' "). As discussed above, ecclesiastical matters go beyond following church scripture or texts, and our precedent has shown the breadth of ecclesiastical matters and church doctrine.

In *Doe*, we distinguished two tort claims that implicated the ecclesiastical entanglement doctrine. On the one hand, we allowed an individual's negligent supervision claim against a diocese and a bishop that stemmed from an alleged sexual assault, reasoning that neutral principles of law permitted adjudicating an individual's claim that the diocese and bishop knew or should have known of the danger posed by the priest to an individual because of his sexual attraction to minors. *Doe*, 242 N.C. App. at 51-55, 776 S.E.2d at 36-39. We concluded there was no need to determine issues such as whether the priest should have been incardinated, allowed to remain a priest, or whether the priest's relationship with the diocese should have been severed. *Id.* On the other hand, we could not adjudicate the same individual's negligence claim based on defendants' failure to compel the priest to undergo sexually transmitted disease (STD) testing. *Id.* at 56, 776 S.E.2d at 40. We reasoned that the liability theory was premised on tenets of the Catholic church, namely, the degree of control existing in the relationship between the bishop and priest. *Id.*

Our Supreme Court held in *Harris* that a trial court could not judge "the proper role of . . . church officials and whether . . . expenditure[s] were] proper in light of . . . religious doctrine and practice." *Harris*, 361 N.C. at 273, 643 S.E.2d at 571. Therefore, "[b]ecause a church's religious doctrine and practice affect its understanding of each of [the concepts at issue], [this is like] asking a court to determine whether a particular church's grounds for membership are spiritually or doctrinally correct or whether a church's charitable pursuits accord with the congregation's

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beliefs,” which are barred. *Id.* Religious doctrine permeates a church’s understandings of numerous aspects of its religious practice. *See id.*

Various other North Carolina cases inform what is included in the ecclesiastical entanglement doctrine. We held in *Emory* that we could not look into a church’s internal customs or practices. *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 493, 598 S.E.2d 667, 670-71 (2004) (barring an examination of informal meeting notice requirements). Yet, in *Azige*, we reaffirmed that courts may resolve church disputes through neutral principles of property law without necessarily becoming entangled in internal church governance concerning ecclesiastical matters. *Azige v. Holy Trinity Ethiopian Orthodox Tewahdo Church*, 249 N.C. App. 236, 239, 790 S.E.2d 570, 572-73 (2016). Likewise, in *Smith*, we did not have to interpret or weigh doctrine in a negligent retention and supervision claim because the claims merely raised the issue of whether church officials knew or had reason to know of a cleric’s propensity to engage in sexual misconduct. *Smith*, 128 N.C. App. at 495, 495 S.E.2d at 398.

United States Supreme Court decisions also support our longstanding aversion for entanglement in ecclesiastical matters. Religious disputes can include “matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.” *See Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713, 49 L. Ed. 2d 151 (1976). Indeed, more than 150 years ago, the United States Supreme Court held that religious disputes could cover “theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them . . . .” *Watson v. Jones*, 80 U.S. 679, 733, 20 L. Ed. 666 (1871). “[*Watson*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, *free from state interference*, matters of church government as well as those of faith and doctrine.” *Kedroff*, 344 U.S. at 116, 97 L. Ed. 120 (emphasis added).

Under our precedent and United States Supreme Court precedent, religious doctrine and ecclesiastical matters are expansive. Statements made during religious disputes can include a religion’s internal customs, practices, beliefs, faith, theology, morality, membership, organization, governance, rules, law, discipline, and degree of control between members. The nature of speech, and alleged defamatory statements in particular, more easily touch upon these subjects than negligence or property claims. To illustrate, a corporation’s communications are riddled with corporate issues and business matters, just as a religion’s internal communications are riddled with religious issues and ecclesiastical matters.

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It is then unlikely that a church's internal communications will be "purely secular." *See Doe*, 242 N.C. App. at 55, 776 S.E.2d at 39 (holding that we have subject matter jurisdiction over an issue when a "claim is a purely secular one" because "[n]eutral principles of law [can] govern th[e] inquiry").

For defamation claims, we must consider whether a statement is true or false without examining or inquiring into ecclesiastical matters or church doctrine. *See Doe*, 242 N.C. App. at 48, 776 S.E.2d at 35. Those matters permeate much of a religion's internal communications, and so it will be a rare occurrence when a religion's internal statements are purely secular. We must remain cautious of deciding the truth or falsity of a religion's internal communications because doing so risks chilling the religion's "associational conduct" or putting our pen's power "behind a particular religious faction." *See id.* at 48, 776 S.E.2d at 35.

Finally, we cannot favor religions with scripture and disfavor religions without scripture. Religions without authoritative scripture or internal documentation would be more susceptible to defamation claims than those without. We cannot disadvantage religions that lack such texts. Nor can we decide if a religion has sufficiently deep ecclesiastical points of faith and practice compared to others. The First Amendment serves to prevent exactly this sort of picking of winners and losers in ecclesiastical matters.

**B. The Statements**

Plaintiffs argue several communications by Defendants were defamatory. For simplicity, we divide analysis of these communications into discrete sets of statements. We hold that determining the falsity of the statements—an essential element of a defamation claim under North Carolina law—would require our courts to examine or inquire into ecclesiastical matters or church doctrine. This is not permitted by the First Amendment or North Carolina precedent. We analyze these communications in turn.

**1. 13 November 2012 Letter**

The first statement Plaintiffs challenge is contained in the 13 November letter addressed from Holleman to Mrs. Lippard and later sent to DHBC's congregation in an expanded form. Plaintiffs primarily challenge the following statement from the letter: "I (we) have yet to hear you [Mrs. Lippard] acknowledge any personal responsibility for your failures." Plaintiffs claim that the statement is false "in that [Mrs.]

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Lippard ha[d] acknowledged her share of responsibility in the dispute with Hix.”

Further context from the 13 November letter shows the ecclesiastical context of the challenged statement. In the 13 November letter, Holleman stated the Deacons’s recommendation to dismiss Mrs. Lippard came from the Deacons’s belief that “[Mrs. Lippard,] by placing conditions upon [her] obedience to the scriptures as they regard reconciliation, ha[s] been the obstacle to that reconciliation.” Holleman stated that, during a reconciliation meeting, he had posed six questions drawn from Ephesians 4 to Mrs. Lippard, with three more direct questions asking her to admit failures in those areas. He continued, saying “it’s true you answered ‘yes’ but you followed that answer three times with the condition of your demand for satisfactory answers from [Hix.] What was evident then was that you had missed the essence of the Biblical text . . .” Holleman went on to identify four “personal failures” of Mrs. Lippard “that are obviously and Biblically demonstrated as failures or sinful”: (1) her immediate response to the song reassignment; (2) that she “failed in [her] continued resistance to the disciplinary actions of the church,” specifically noting that “Hebrews 12:11 exhorts [DHBC members] to be ‘exercised’ or ‘trained’ by [the reconciliation process]”; (3) Mrs. Lippard’s alleged “slandorous comments about a fellow believer”; and (4) her “implied accusation that [Hix] had intentionally concealed the music for his solo . . . .”

Plaintiffs ask us to determine the truth or falsity of Holleman’s claim that he and the Deacons had not heard Mrs. Lippard “acknowledge any personal responsibility for [her] failures.” What is apparent from the 13 November letter is that the acknowledgment of personal responsibility Holleman refers to is acknowledgment in the context of reconciliation between persons under biblical doctrine as DHBC understands it. Courts cannot undertake such an inquiry.

To determine whether Mrs. Lippard’s conduct constituted an “acknowledge[ment] of personal responsibility” under these conditions would require courts to interpret religious doctrine. Here, the statement at issue is whether Mrs. Lippard acknowledged personal responsibility for her failures. To determine the truth or falsity of that statement, the trial court would have to determine (1) what Mrs. Lippard’s “failures” were, in biblical context, and (2) whether Mrs. Lippard’s conditional response to the questions asking her to admit failures based on the text of Ephesians 4 was sufficient under DHBC doctrine. We hold the ecclesiastical entanglement doctrine under the First Amendment prohibits this inquiry.



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**2. 28 November 2012 Sermon**

Plaintiffs next contend statements Holleman made in a 28 November 2012 sermon delivered to the DHBC congregation were defamatory. Plaintiffs challenge Holleman's statement that "[Mrs. Lippard] had yet to acknowledge any wrongdoing and that this refusal was the basis for the Deacon's [sic] recommendation [to dismiss her as staff church pianist]." They further challenge Holleman preaching that the Deacons's decision was based on Mrs. Lippard's "unwillingness to commit" to DHBC's reconciliation process; that Mrs. Lippard's refusal to accept responsibility "for any possible error was as strong, if not stronger than ever[]"; and that Mrs. Lippard "never conceded to any wrongdoing." Plaintiffs also challenge Holleman's claims that Mrs. Lippard accused Hix of lying and intentionally hiding sheet music and making slanderous comments about a fellow choir member.

The content of the 28 November sermon restates and expands on the 13 November letter and our analysis demands the same result. The record shows that Holleman delivered the challenged statements during a sermon explaining the Deacons and Personnel Committee's decision to recommend Mrs. Lippard's termination as church pianist and advocating for the congregation to approve that termination. Specifically, Holleman describes the sermon and gathering as "a necessary, though infrequent, part of New Testament Church life and ministry," and the attempted "reconciliation process" and recommendation for termination as an "application of church discipline" and as "follow[ing] the New Testament pattern for church discipline."

At the outset of the 28 November sermon, Holleman taught that the disciplinary process is based on Matthew 18:15-17. Further, as initially stated in the 13 November letter, Holleman's comments throughout the 28 November sermon made clear that his appeal for commitment to the reconciliation process and acceptance of personal responsibility from Mrs. Lippard stems from following Ephesians 4:3. Plaintiffs contend Mrs. Lippard "was always willing to commit to the reconciliation process, having attended all the reconciliation meetings," and that she had acknowledged personal responsibility for her failures because she "had in fact apologized numerous times for any perceived or actual missteps on her behalf." These assertions, however, only illustrate that what is at issue here is not merely a matter of fact, but what constitutes "willingness to commit" to DHBC's reconciliation process and "acceptance of personal responsibility" in accordance with its doctrine.

To evaluate the truth or falsity of these statements, we would need to inquire into religious doctrine and practice. In particular, we would



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have to decide whether, as Plaintiffs contend, Mrs. Lippard's mere attendance at reconciliation meetings constituted "willingness to participate" in those meetings, and whether her asserted apologies to Hix sufficed for "acceptance of personal responsibility" in the context of DHBC's reconciliation process. Resolving these questions would involve our courts in determining such essential points of doctrine as what "reconciliation," "wrongdoing," and "acceptance of personal responsibility" mean, which would necessarily involve interpretation of Matthew 18 and Ephesians 4. Courts cannot make such determinations without running afoul of the First Amendment.

**3. Ballot and Absentee Ballot**

Plaintiffs next contend the language of the Ballot and Absentee Ballot ("the ballots") disseminated to the congregation was defamatory. The specific language Plaintiffs challenge, which was identical on the ballots, stated:

The Deacons & Personnel Committee recommend that [Mrs.] Lippard be immediately dismissed from her duties as church pianist, due to her unwillingness to admit to any wrongdoing, or to commit unconditionally to the process of reconciliation.

Then, "based upon the following three questions," the ballots asked congregants to "render a decision":

- [1]. Have [Mrs. Lippard]'s actions been clearly demonstrated to her and to you as wrong according to the Scriptures?
- [2]. Have the efforts of the Deacons, Personnel Committee and Pastor to restore her into the fellowship of the Body of Christ been sufficiently exercised with careful deliberation, patience, and graciousness, and according to the Scriptures?
- [3]. Has [Mrs. Lippard] responded positively as instructed by the Scriptures?

Plaintiffs' defamation claim based on the language of the ballots, which is similar to statements made by Holleman in the 13 November letter and 28 November sermon, is barred by the ecclesiastical entanglement doctrine of the First Amendment. To determine the truth or falsity of the claim that Mrs. Lippard was "unwilling[] to admit to any wrongdoing, or to commit unconditionally to the process of reconciliation," we would have to inquire into whether the actions Mrs. Lippard took throughout

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the reconciliation process comported with DHBC's understanding of the requirements of scripture. The ecclesiastical entanglement doctrine prohibits this inquiry.

**4. Communications by Hix about Mr. Lippard**

Plaintiffs next argue two statements by Hix were defamatory. They contend oral communications made by Hix to an unidentified congregant on 23 December 2012 were defamatory. They also contend an email sent to Brewer, a DHBC choir member, on 8 January 2013 contained a defamatory statement.

Plaintiffs allege that on 23 December 2012, Hix said “[Mr.] Lippard is a liar and you and other people like you are believing him instead of Scripture.”<sup>3</sup> Without conceding the statement was made, Defendants contend the statement “was made in the context of Hix’s interpretation of and Mr. Lippard’s compliance with scripture.” Therefore, Defendants argue, “[a]n inquiry into the falsity of the statement would require a comparison of Mr. Lippard’s conduct with Scripture, which also prohibits lying.” We presume “people like [Brewer]” refers to other DHBC members who support Plaintiffs. To decide whether Mr. Lippard lied and if people like Brewer believed Mr. Lippard instead of DHBC’s interpretation of scripture, we would need to inquire into DHBC’s definition of lying, when to believe scripture, and how scripture determines whom to believe. This is an issue over DHBC’s internal customs, practices, morality, and degree of control between members. It cannot be said that this statement is purely secular. Analyzing the truth or falsity of this statement would require us to assess whether the alleged words or deeds comport with or contravene the teachings of scripture regarding lying and DHBC’s interpretation of it, an inquiry prohibited by the First Amendment.

Plaintiffs also contend the following statement from an 8 January 2013 email to Brewer is defamatory: “Note that there are verifiable facts and Biblical scriptures which [Plaintiffs] are openly denying and defying.” Defendants again argue that “[a]n inquiry into the falsity of the statement would require a comparison of [Plaintiffs’] conduct with Scripture and whether they were openly denying and defying the Scripture.” As we discussed above regarding the 13 November 2012 letter, Plaintiffs ask us to determine the truth or falsity of Hix’s claim that Plaintiffs were “openly denying and defying” “verifiable facts and Biblical scriptures.”

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3. We cannot separate the 23 December 2012 statement into two parts and must read it as a whole because it is a complete sentence without a comma that would indicate a compound sentence of two thoughts.

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This statement arose when Brewer was concerned that “taking anyone off the [Special Music] schedule” was an inappropriate “form of discipline in a church setting.” Hix replied, in part, that

[Brewer] might want to look closely and note that while [Mrs. Lippard] and [Mr. Lippard] were removed from the Special Music schedule, that I also removed myself from that rotation. *Note also that there are verifiable facts and Biblical scriptures which they are openly denying and defying.* Those facts and scriptures still stand. The church vote allowed [Mrs. Lippard] to keep her position as pianist, but it did not answer the biblical appeal for reconciliation. That appeal was extended by 17 out of 18 of our senior church leaders. Until [Mr. Lippard] and [Mrs. Lippard] are prepared to respond to the appeal which was, has been, and continues to be extended in biblical love, it would not be appropriate to restore them to a position of leading worship within the church.

For many, music is worship as it is a celebration of faith and often a time of prayer. Confirming the veracity of Hix’s claim would require us to inquire into and examine DHBC’s internal discipline process, biblical appeals for reconciliation, and Hix’s ability to direct and control the members of DHBC’s music organization. Hix’s assessment of whether Plaintiffs are “openly defying” “verifiable facts and Biblical scriptures” directly informed his decision of whether “it would . . . be appropriate to restore them to a position of leading worship within [DHBC].” Further, an inquiry into the falsity of whether Plaintiffs were “openly denying and defying” “verifiable facts and Biblical scriptures” would also, again, require us to examine DHBC’s customs and practices relating to the biblically-based reconciliation process. The ecclesiastical entanglement doctrine under the First Amendment prohibits this inquiry as well.

**5. Communications by Holleman about Plaintiffs to his Congregation**

Plaintiffs next contend statements made by Holleman to various church members regarding Plaintiffs were defamatory. Specifically, Plaintiffs cite a 16 January 2013 letter from Holleman to Brewer, a 6 April 2013 email from Holleman to Brewer, and a 25 April 2013 email to Myers.

**a. 16 January 2013 Letter**

Plaintiffs allege that a litany of excerpts from the 16 January letter were defamatory. Among others, Plaintiffs claim the following statements

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made by Holleman were defamatory: (1) “I was not exaggerating when I said to the church that [Plaintiffs] have been confronted with appeals for reconciliation 26 times since 2010[]”; (2) “Obviously, [Mrs. Lippard] is not required to do these things [(i.e., voluntary service to the church)] as a part of her job description but if there was an eagerness to serve as a staff member and a joyful participant in the ministry of [DHBC], it seems that she might find a place of service[]”; (3) “I can’t imagine why [Mrs. Lippard] would have been resistant to the idea [of voluntary service] to this day, but that resistance certainly doesn’t communicate a spirit of willingness and cooperation”; (4) “[Mrs. Lippard is] the present obstacle to reconciliation between her and [Hix]”; and (5) “No doubt there are more strategies against the church leadership playing out tonight.”

Analyzing the falsity of excerpts (1)-(4) would require us to interpret or weigh DHBC’s interpretation of scripture and doctrine. For example, in determining whether it is true that “[Plaintiffs] have been confronted with appeals for reconciliation 26 times,” we would have to determine what constitutes an appeal for reconciliation within DHBC. Whether Mrs. Lippard was a “joyful participant in the ministry of the church” and had “a spirit of willingness and cooperation” ultimately turn on the meaning of those terms within DHBC membership and doctrine. Finally, determining the falsity of Holleman’s identification of Mrs. Lippard as “the present obstacle to reconciliation between her and [Hix]” would again require us to interpret the reconciliation process and the responsibilities of participants according to scripture as interpreted by DHBC. Each of these examinations would cross the ecclesiastical boundary line under the First Amendment.

The fifth excerpt that “there are more strategies against the church leadership playing out tonight” does not directly invoke scripture, but it does involve other ecclesiastical matters.<sup>4</sup> The excerpted statement arose in the midst of Holleman explaining, to a member of his congregation, his thoughts on the ongoing dispute, controversy, conversations, confrontations, and involvement of fellow DHBC members:

I am in heartfelt agreement with you here [that the “back-and-forth” must stop]. Since the vote, the only action taken by the church leadership has been to delay [the Lippards’] reinstatement into the solo rotation. I’ve given our reasons above. While I can’t speak for every member, as far as I’m aware, every new conversation or

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4. We note scriptural interpretations of this phrase are possible, but Defendants do not make any such argument on appeal.

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controversy has been initiated by [the Lippards], or by those who have been advocating for their position. You yourself have attempted to engage me in conversation at the church. You have asked to speak with James Orbison. And now you've written this letter and had it delivered to me, Bryan Sherrill, and Bill Wooten. [Mr. Lippard] has confronted [Hix] multiple times, and this very day, I've met with Billy Lynch for breakfast, whom [Mr. Lippard] had confronted at Church with a copy of Alan's directives to [Mrs. Lippard]. I've learned that [Mr. Lippard] has e-mailed [Hix] requesting an explanation for why he and [Mrs. Lippard] have not been returned to the solo rotation. And Bryan Sherrill indicates that [Mr. Lippard] called him today attempting to "catch" me in some mistake. These are just a few. *No doubt there are more strategies against the church leadership playing out tonight.* The only time I or the church leadership have engaged in further conversation has been when we have been compelled to answer publicly some charge of wrong doing. You claim that you want the back-and-forth to stop yet here I am, a month after the church vote, writing out an answer to your uninformed accusations of our mishandling of the past issues, while [Hix] and Bryan are fielding additional complaints and accusations from [Mr. Lippard]. It would seem that in large part the back-and-forth ceasing is up to you and [Mr. Lippard]. For my part, you are reading what is at least near to being my last word on the matter. As to your accusation that "Someone, mainly [Hix], wants [Mrs. Lippard] off the piano." Short of making a motion for [Mrs. Lippard's] dismissal from the fellowship of the church, what disciplinary action would you have suggested? I think the Deacons brought the best recommendation they could bring that would communicate to [the Lippards] the seriousness of an irreconcilable spirt while also providing grace and room for their appropriate response. I doubt that they would have been any less enraged by a suspension, given the fact that [Mr. Lippard] rejected my offer that he and [Mrs. Lippard] might, like [Hix], take a leave of absence until the matter could be resolved. Your accusation that "mainly" [Hix] wanted [Mrs. Lippard] removed from the piano, says more about you [sic] personal opinion of [Hix] than it does about the reality of the issue. I'm sure that

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[Hix's] attempts at trying to find a way to work with [Mrs. Lippard] have been a source of frustration for him over the years, but never has he indicated in the slightest that her removal was the solution. [Hix] recognized early on that the roots of their contentious relationship were primarily in [Mrs. Lippard's] personal dislike of him. His willingness to participate in the series of meetings I had with them was evidence of his desire to address those roots and to make whatever adjustments were needed to better their relationship. Having presided over those meetings, I am convinced that he [sic] effort was sincere. To summarize, nothing in [Hix's] behavior over the past several months would support your claim that his (or our) aim has been [Mrs. Lippard's] removal as church pianist.

This quote itself is excerpted from a 13-page pastoral letter. The letter is a formal "Pastoral Response" to a complaint filed by a member of the church. The letter and the complaint "regard[] [Mrs.] Lippard" and her "recent disciplinary action." The letter concludes that "God Himself will be the judge of this and while I hope that men will know my heart, I cannot ultimately be persuaded of my rightness or wrongness by their Biblically unsubstantiated opinions alone."

Plainly, this controversy and ongoing dispute with the Plaintiffs is a matter of DHBC's internal membership, organization, governance, discipline, and degree of control between members. We cannot decide the rightness or wrongness of this statement by a pastor communicating with his flock.

**b. 6 April 2013 Email**

Plaintiffs also contend Holleman defamed them in a 6 April email to Brewer. In the email, Holleman stated:

There were several there the Wednesday night that [Mr. Lippard], with [Mrs. Lippard] behind him, blocked [Hix's] exit from the music room and was aggressively going after [Hix], pointing his finger in [Hix's] face, an action I recently learned was illegal and could have very well been reported as a crime.

This excerpted statement does not directly involve scripture, but it does involve DHBC's customs, doctrine, and practice regarding membership and member conduct. This accusatory excerpt was made in the midst of

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an extensive multi-page email chain that contains several references to scripture and discusses DHBC and Holleman's handling of the dispute:<sup>5</sup>

[Header of the 6 April 2013 9:07 AM email from Brewer to Holleman.]

Hi [Holleman,]

I guess due to you not replying to the last E-Mail, you disagree with having a meeting with [Mrs. Lippard] and [Mr. Lippard].

I am very saddened[.] Could it be that they were wronged and have additional information to prove it[?] Could it be that others should also be present at a meeting to address their part of the issues[?] Could it be that you and the committ[e]es were totally right[?] By giving them an additional meeting[,], could [it] settle the whole matter or not[?] There is everything to gain and nothing to lo[]se. Is everything better now by not giving them additional attention or not? When I was the[re] last[, DHBC] members were going around telling other members not to speak to [Mr. Lippard].

Is this Christian actions[?] By not giving them the needed attention they deserve[?] You, committee members and others should give them an apology for the way things were handled. You know yourself that [Mr. Lippard] was only protecting his wife and trying to get someone[']s attenti[on] about setting up a meeting and settling the Issues!

[Holleman] I have been very concerned about your ministry and would not want anything to hinder that[.] Also[,], I always try to think of [DHBC] and ways [to] prevent conflict. [DHBC] has been through many Issues in the past. Mostly petty issues which t[ea]r the cong[r]e[g]ation apart[.] WE should learn from our mistakes[.]

However[,], it appears that we don't always. That's also partially why our membership does not grow. I trust that

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5. Alterations to the email chain include adjusting the names of the parties for consistency, removing extraneous spacing and parentheses, adding paragraph breaks, and correcting some grammatical and spelling errors.

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everyone will do what[']s right through this conflict by showing love and concern for all, even through conflicts.

Signed[,]

[Brewer]

[Header of the 6 April 2013 5:25 PM email by Holleman replying to Brewer.]

I didn't respond because you wrote that you had said all you wanted on the matter. My assumption was that you had also heard all you wanted.

You're correct in assuming that I and the Deacons, and the Personnel Committee will not provide another meeting with [Mr. Lippard] and [Mrs. Lippard]. We have had 5 meetings with [Mr. Lippard] and [Mrs. Lippard] and if you count the [DHBC]-wide meeting, they've had no fewer than 6 opportunities to ask their questions. In each of these meetings we have answered their questions along with numerous times in one on one conversations.

The Deacons have indicated to [Mr. Lippard] that if he wanted to have a conversation about reconciliation, we would be happy to have that conversation. We will not provide [Mr. Lippard] with a public platform to make accusations against [Hix] or the leadership which he cannot give evidence for beyond his own suspicions. I Timothy 5:19 says, "Receive not an accusation against an elder without two or three witnesses." True, [DHBC] doesn't elect elders, but leaders serve the same function, particularly staff members. How would you like it if a single person came to me and demanded a church meeting to publicly accuse you of all kinds of things without having a single substantial piece of evidence or a witness to validate those accusations? Would you be so eager for that meeting? I think not.

So then your suggestion that we abandon the Biblical instruction and "give [Mr. Lippard] all the meetings he wants" to make all the accusations he wants certainly does not have the good and health of [DHBC] in mind. You are advocating for [Mr. Lippard]'s desire to do what the scriptures forbid. I am certain that if [Mr. Lippard] had any substantial evidence to validate any of his claims, we



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would have been informed by now via phone call, E-mail, or personal contact. He certainly has not been reluctant to raise his “points” thus far.

I would add that you continue to refer to “others being in a meeting.” I’m at a loss to understand why you and [Mr. Lippard] cannot seem to understand that [Hix] hasn’t been a part of the discussions since August 22, 2012? We’ve not been defending [Hix], or his actions past or present, yet every time you send an e-mail or every time [Mr. Lippard] confronts someone, it involves [Hix]. The actions of the Leadership and 59% of [DHBC] are not a vindication of [Hix] or his actions, they are simply the actions resulting from [Mr. Lippard] & [Mrs. Lippard]’s refusal to yield to what the Word of God says.

I very much protest your implied accusation that [Mr. Lippard] has some information that we are trying to suppress by not allowing him to have a meeting. I think seven months of meetings and discussions is ample, in fact abundant, time for him to have brought such evidence forward.

Your opinion is getting pretty clear. You obviously agree with [Mr. Lippard] that we or (I) have not acted Biblically or in a Christian manner towards [Mr. Lippard] and [Mrs. Lippard]. If that’s true then I ask that you provide some evidence of that beyond your own opinion. Otherwise you are very close to becoming a false witness against those who are called to lead [DHBC] according to God’s word. (Ephesians 4:11-12)

An additional meeting will not settle the whole matter, because the “matter” to be settled is whether or not [Mr. Lippard] and [Mrs. Lippard] are going to obey God and the scriptures. They have refused to yield from the beginning to the Word of God. I am exhausted with trying to explain that to you, and your continuing advocacy for [Mr. Lippard] and [Mrs. Lippard] have made it increasingly difficult for us to keep directing their attention to the Biblical injunction to be reconciled. Your encouraging them and lending a sympathetic ear, have only deepened their resolve to reject our appeals and while you think yourself to have been acting in a Christian manner toward them, you have actually (unwittingly or not) contributed to

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pushing them farther away from the Lord and the true peace that might have been, and still may be, found in Him.

That [Mr. Lippard] and [Mrs. Lippard] are out of fellowship with God and [DHBC] is painfully evident in the methods they are employing against the leadership of [DHBC]. I can't tell you how many times [Mr. Lippard] has twisted my words to make them say something to fit his agenda. He even claimed that I admitted to him that "I framed him and [Mrs. Lippard] with the August 22nd meeting." Absurd! He always fails to inform folks that I was very explicit with the conditions set for the meeting, days before, at the start, and again at the conclusion of that meeting. [Mr. Lippard] agreed to those conditions, and even admitted later that he did so because he knew that it was the only way he could get a face to face meeting with [Hix].

I ask you[: W]ho was being dishonest there? I was completely straightforward and transparent about the nature of that [Wednesday] meeting [on 22 August 2012], and he agreed only so that he could conceal his true motive. That should tell you that [Mr. Lippard] and [Mrs. Lippard] did not come into that meeting seeking reconciliation as was the stated purpose, but to confront [Hix] with their accusations. And accuse they did! [Mr. Lippard] finally just interrupted me bluntly, dismissed the scripture I had used, and demanded of [Hix] an explanation for the song reassignment. [Hix] answered and that didn't satisfy them and [Mr. Lippard] and [Mrs. Lippard] immediately went after him. At that point, as indicated to them beforehand, I ended the meeting and informed them that matter would follow the Matthew 18 mandate. There were witnesses there to confirm everything I've said about that [Wednesday] meeting.

No person in leadership has endorsed anything less than respectful behavior toward [Mr. Lippard] and [Mrs. Lippard]. If there are members, leadership and otherwise who have who have refused to speak to [Mr. Lippard] and [Mrs. Lippard], they have not done so at my request. I have been cordial and respectful to [Mr. Lippard] and [Mrs. Lippard], prior to the church vote and following it.

If folks have been standoffish, it might have something to do with [Mr. Lippard] and [Mrs. Lippard]'s behavior. Some

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folks have witnessed their confrontations. *There were several there the Wednesday night that [Mr. Lippard], with [Mrs. Lippard behind him, blocked [Hix]'s exit from the music room and was aggressively going after [Hix], pointing his finger in [Hix]'s face, an action I recently learned was illegal and could have very well been reported as a crime.* (emphasis added).

Add to these the numerous “parking lot” confrontations, and angry telephone calls, and it might at least explain why some folks are avoiding them. I’m not suggesting that this is the right response, but you make it sound as though the folks that are “shunning” them are doing so without any provocation at all. To be honest with you, there are a few that are even frightened by [Mr. Lippard]’s aggressiveness, and I’ve told him this. Having said this, I would say that the withholding of full fellowship from a rebellious and disobedient (To the Scriptures) believer has Biblical precedent (2 Thessalonians 3:14-15; Romans 16:17-18).

For this reason, while I have tried to speak to [Mr. Lippard] and [Mrs. Lippard] at every opportunity, and be respectful and cordial, I have not treated them in such a way as to imply or suggest to them that they have been restored to full fellowship with [DHBC]. They cannot reject the Word of God and refuse to be reconciled to their brothers and still enjoy a proper fellowship with God and it is wrong and unloving to treat them in such a way as to obscure that reality. If the Lord brings to mind by the Holy Spirit or through His word that I have wronged or acted wrongly toward [Mr. Lippard] and [Mrs. Lippard] or anyone else, you can be assured that I will make that right without delay. But as I’ve said to you multiple times already, if you or [Mr. Lippard] and [Mrs. Lippard] can demonstrate Biblically that this issue has been mishandled or that grace and mercy and the humility of Galatians 6:1 has been omitted, I will gladly apologize.

Did you know that I have submitted for the review of four fellow Pastors, a written account of every action we’ve taken and every decision I’ve personally made, including all the arguments that [Mr. Lippard] and others have raised[?] [A]nd do you know that they have not discovered a single error in our handling of it, and in fact have

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commended the [DHBC] leadership for the thoroughness and Biblical consistency with which they've navigated through this issue[?] Obviously God will be the final judge, but I find great encouragement that four of my mentors, Pastors who have been in the ministry for years, have said that they weren't sure that they would have "handled" it as well.

For this grace, I am deeply grateful to God. I have spent hours agonizing over decisions and the words with which I should convey them, and in my flesh, I would have surely failed miserably, but all the while, God was impressing me to just follow the Word. With His grace, and to His glory, that's exactly what we've done. I am content if we have been pleasing to Him. You may have been concerned about me personally, but I don't think you have been concerned about "the ministry to which God has called me." In fact, I don't think you really understand that ministry.

For me, church is not merely a background scene in front of which I live my life. I'm not just pulpit furniture that just happens to be in place each Sunday morning, Sunday night, and Wednesday. When I stand in that Pulpit, I feel the weight of the responsibility to "rightly divide the Word." There is an urgency in my heart that almost makes me feel as though if I don't preach in such a way as to display the glory of Christ, I will have utterly failed. There's a desperation in my heart that everyone present might see that we don't just have a religious book in our hands but the very word and voice of God Almighty. You may think that my aim is to "keep the peace," but you forget that the Lord Himself said, "Think not that I have come to bring peace on the earth, but a sword...." (Matthew 10:34-39).

Oh don't misunderstand, I'm a peace lover too. By nature I'm not confrontational at all. But I will not settle for a superficial peace that continues to allow sin to fester and grow under the surface, only to erupt at the slightest "petty" disagreement, and I'm fully aware that that position will not be appreciated by all. Jesus said as much, if you'll read the entire reference mentioned above (Mat. 10:34-39)[.]

You're right, [DHBC] in large part has not learned from its past mistakes and one of those mistakes has been

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to avoid confrontation when it was actually confrontation that was needed to expose the root that caused it. (1 Corinthians 11:18-19) Equally contributing to that error is the unbiblical idea of the church as a collection of individuals, completely without accountability. We've adopted an Americanized Christianity that has everyone as independent and self-determining lone-rangers. Did you know that nothing could be farther from the Bible? What [DHBC] has never learned is that without willful submission to becoming accountable to God and other believers, the intimacy that everyone claims to want and enjoy is impossible. So resistant are we to the ideal of humble submission and willful vulnerability that we've decided that we would settle for a shallow, soon to be broken, intimacy. I suspect that [DHBC] has settled for that for so many years that they've begun to think that's the norm. It's not...I assure you!

The Lord can change that though, and I think that's what He might be up to in all of the last seven months. The question I suppose is this: "will I, will you, will [Mr. Lippard] and [Mrs. Lippard], will [DHBC] trust God enough to simply obey Him? Will we wait for him to lead us through the darkness of this present valley, believing with our whole heart that there's a bright meadow on the other side?["]

This may be more than you can digest in one reading, but I don't think I need to say much more than this. No, I absolutely don't agree with you on multiple Biblical grounds, but the increasingly antagonistic and accusatory tone of your e-mails suggest to me that I'm alienating you ever farther and since that makes no sense and is not ultimately helpful, I'll just leave things as they are.

I would add one more question. With the exception of my leaving the jobsite angrily many years ago, [i]n the 28 years you have known me and in the 7 years I've served as Pastor at [DHBC], have you observed anything in my character that would suggest to you that I would have acted as maliciously in this issue as [Mr. Lippard] has undoubtedly portrayed me to you and others? [I]f not, I can't understand how you would so quickly attribute to me the character he suggests.

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If I have in fact acted as treacherously and deceitfully as [Mr. Lippard] would have you believe, there is a constitutional recourse available to you and [Mr. Lippard]. You can develop and circulate a petition for my dismissal as Pastor. You can force a motion before [DHBC] with a petition signed by 25% of the membership and [DHBC] will be forced to vote on the matter.

To be honest, if I am guilty of what [Mr. Lippard] charges me with and what you suspect me of, you would be well within your Christian duty to do exactly that.

Respectfully and Prayerfully,

Larry

[Header of the 6 April 2013 6:45 PM email from Brewer to Holleman.]

Hi [Holleman,]

I know that the committee members were addressing [Mrs. Lippard] only, I knew that then[.] However[, Hix] was [a part] of the conflict with the song and as Director. This part is my real issue. I have had issues with [Hix] before and believe there [is] more to it. [N]o one is perfect[.] [H]owever[, Hix] should be willing to address their issues. That may be why they want another meeting. Another meeting can[']t hurt and may settle it all. No reply necessary[.]

[Brewer]

[Header of the 7 April 2013 email from Brewer to Holleman.]

I was thinking about the letter overnight. I think how ironic you twist and turn things around and now blaming me. I guess I am to blame for at least one thing[—s]howing concern[.]

Let me ask you this[, d]id [Mrs. Lippard] agree to go through reconciliation about the issues 2 1/2 years ago and did you say things were going well[?] Did you say that you were going to recommend to the [D]eacons to drop the issues[?] If that is the case, why was that reinstated as a problem[?] I have said in the beginning that [Hix]

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should be at the meeting on Wednesday night in question. The song issue has not been settled. Until [Hix] is willing to meet with [Mrs. Lippard] and [Mr. Lippard] and settle their issues. There is no reconciliation. I don't know what they wanted to discuss in a meeting[.] But[, ] I think another meeting is necessary. If [Hix] had been present at the Wednesday night meeting in question, things could have been possibly settled. I never intended to question your abilities[.] Only to grab your attention[.] I would not want you to lo[ ]se your job over this. Also[, i]t bothers me big time that this can and does affect [DHBC] membership. We must handle issues above board as quickly as possible.

Sign

[Brewer]

Reply

As in *Harris*, we would be forced to determine whether the statement at issue is proper in light of DHBC's customs, doctrine, and practice regarding membership and conduct. The statement arose from Holleman's observations of how "folks" in the church "have been standoffish" and "have witnessed [Plaintiffs'] confrontations." The email's language, after the statement, explicitly discusses that "withholding of full fellowship from a rebellious and disobedient (To the Scriptures) believer has Biblical precedent (2 Thessalonians 3:14-15; Romans 16:17-18)." Looking into DHBC's membership governance and how it should react to what it considers improper conduct would require examining church customs, doctrine, and practice.

**c. 25 April 2013 Letter**

Finally, Plaintiffs contend Holleman defamed them in the 25 April letter to Mr. Myers. Specifically, Plaintiffs challenge Holleman's statement that "[Hix] indicated his willingness to acknowledge his own failures and ask forgiveness. [Mrs. Lippard] did not!" They argue that statement is false because "[Mrs. Lippard] apologized to Hix several times, even in writing, for any perceived or actual missteps on her behalf." As in the 28 November 2012 sermon discussed above, we are barred from evaluating this statement under the ecclesiastical entanglement doctrine because, in determining the truth or falsity of the claim that Mrs. Lippard did not "acknowledge [her] own failures and ask forgiveness," we would have to interpret and weigh DHBC doctrine to determine what constitutes "acknowledgement" of failures and "ask[ing] forgiveness" as part

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of DHBC's process of reconciliation. Therefore, analysis of this statement is barred by the First Amendment.

None of the statements at issue here are purely secular, but we can imagine scenarios where members of a religion make defamatory statements wholly apart from religion. Churchgoers could make defamatory statements against one another outside their religious lives and instead in their personal, business, academic, or other aspects of their temporal existence. But the statements at issue here were made between members of the same congregation—including its pastor—about an internal dispute regarding ecclesiastical matters. All the statements before us would unconstitutionally require examining or interpreting ecclesiastical matters or religious doctrine, and we may not do so under the First Amendment or the North Carolina Constitution.

**CONCLUSION**

Plaintiffs appeal the trial court's grant of summary judgment and argue several errors. We affirm the trial court's order on the ground that all statements Plaintiffs challenge are barred by the ecclesiastical entanglement doctrine. Having determined all of Plaintiffs' claims on this ground, we do not address Plaintiffs' remaining challenges.

AFFIRMED.

Judge BERGER concurs.

Chief Judge McGEE concurs in part, dissents in part, and concurs in the judgment in a separate opinion.

McGEE, Chief Judge, concurring in part, dissenting in part, and concurring in the judgment.

I disagree with the majority that the ecclesiastical entanglement doctrine under the Establishment Clause and Free Exercise Clause of the First Amendment and Article I, Section 13 of the Constitution of North Carolina bars the courts of our state from considering defamation claims as to all the alleged statements challenged by Plaintiffs in the present case. I would hold that some of the claims at issue are barred by the ecclesiastical entanglement doctrine; however, four others are not.

**I. Summary**

In determining whether the ecclesiastical entanglement doctrine bars the courts of our state from considering an issue, the fundamental



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question is “whether resolution of the legal claim requires the court to interpret or weigh church doctrine.” *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398, *appeal dismissed*, 348 N.C. 284, 501 S.E.2d 913 (1998) (citing *Serbian E. Orthodox Diocese v. Milivojevic*, 426 U.S. 696, 710, 49 L.Ed.2d 151, 163 (1976)). In the context of a defamation claim, which in North Carolina as in other states includes as an essential element the falsity of the statement made, whether courts may apply neutral principles to resolve the claim depends on whether determining the truth or falsity of the allegedly defamatory statement “requires the court to interpret or weigh church doctrine.” Although the majority applies this test correctly in some places, in others it expands this analysis by holding that courts are barred from analyzing defamation claims where they arise out of “matter[s] of [] internal membership, organization, governance, discipline, and degree of control between members[,]” even when the allegedly defamatory statements do not on their face address those topics and determining the truth or falsity of those statements would not require our courts to pass upon ecclesiastical issues, such as where one party accuses another of a crime, or of lying about “verifiable facts.” The majority’s reading is at odds with precedent in this state and would “go beyond First Amendment protection and cloak [religious] bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded,” *Smith*, 128 N.C. App. at 495, 495 S.E.2d at 398 (citation omitted), effectively prohibiting recovery by those harmed by tortfeasors on the basis of the victims’ religious affiliation.<sup>1</sup>

In the case of defamation claims, I would hold that courts must evaluate the specific elements of the claim, including the falsity of the alleged statement, and determine whether “resolution of [the truth or falsity of the alleged statement] requires the court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim.” *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398. Based on this analysis, I concur with the majority’s holding for some of Plaintiffs’ defamation claims that they are barred because resolving the claims would require courts to interpret or weigh church doctrine. For four allegedly defamatory statements discussed below, however, I disagree and would hold that there is no need for the court to interpret or weigh church doctrine

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1. See N.C. Const. Art. I, sec. 18 (“every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law[.]”); *id.* Art. I, sec. 19 (“No person shall be denied the equal protection of the laws; nor shall any person be subjected to discrimination by the State because of . . . religion . . .”).

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in its adjudication of the truth or falsity of these claims. Therefore, I dissent in part.

For the claims that I would hold are not barred by the ecclesiastical entanglement doctrine, I would nevertheless hold that Plaintiffs have not shown sufficient evidence for libel *per se* or special damages as required for libel or slander *per quod*. Therefore, I concur in the majority's judgment affirming the trial court's grant of summary judgment for Defendants.

II. Analysis

The Establishment Clause and Free Exercise Clause of the First Amendment and Article I, Section 13 of the North Carolina Constitution prohibit civil courts "from becoming entangled in ecclesiastical matters." *Doe v. Diocese of Raleigh*, 242 N.C. App. 42, 47, 776 S.E.2d 29, 35 (2015) (citation omitted); see *Harris v. Matthews*, 361 N.C. 265, 270, 643 S.E.2d 566, 569 (2007) ("The constitutional prohibition against court entanglement in ecclesiastical matters is necessary to protect First Amendment rights identified by the 'Establishment Clause' and the 'Free Exercise Clause.'" (citation omitted)). Our Supreme Court has long defined an "ecclesiastical matter" as

one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals.

*E. Conference of Original Free Will Baptists of N.C. v. Piner*, 267 N.C. 74, 77, 147 S.E.2d 581, 583 (1966) (citation and quotation marks omitted), *overruled in part on other grounds by Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973).

In the present case, however, Plaintiffs challenge neither the "adoption and enforcement within a religious association of needful laws and regulations for the government of membership," nor DHBC's "power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church."<sup>2</sup> Whether

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2. In a previous case this Court held the same plaintiffs were barred from doing so. See *Lippard v. Diamond Hill Baptist Church*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 821 S.E.2d 246, 249

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ecclesiastical matters are implicated in Plaintiffs' claims for defamation in the present case turns on whether the claims "concern doctrine, creed, or form of worship of the church."

"The dispositive question" in determining whether a court is barred from deciding a cause of action because it would become entangled in ecclesiastical matters "is whether resolution of the legal claim requires the court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim." *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398 (citing *Milivojevich*, 426 U.S. at 710, 49 L.Ed.2d at 163). The application of the ecclesiastical entanglement doctrine to defamation claims is a question of first impression in North Carolina and our precedents delineate the contours of the ecclesiastical entanglement doctrine and are applicable here.

A. North Carolina Caselaw on Ecclesiastical Entanglement Doctrine

In *Atkins v. Walker*, 284 N.C. 306, 200 S.E.2d 641 (1973), which this Court described as the "seminal case" on the ecclesiastical entanglement doctrine in *Emory v. Jackson Chapel First Missionary Baptist Church*, 165 N.C. App. 489, 493-94, 598 S.E.2d 667, 671 (2004), a dissenting faction of a Baptist church filed a complaint against members of the church and the pastor seeking a declaration that the plaintiffs were the "true congregation," that the pastor-defendant "be restrained from continuing to act as its pastor" and that the defendants be required to surrender the church property to the plaintiffs. *Walker*, 284 N.C. at 307, 200 S.E.2d at 642. The complaint alleged that a division had arisen in the congregation and the plaintiffs remained faithful to the previous doctrines and practices of the church while the defendants had departed from those doctrines and practices. *Id.* at 307, 200 S.E.2d at 643. The trial court submitted questions to the jury asking it to determine (1) whether plaintiffs remained faithful to the doctrines and practices of the church as previously practiced and (2) whether the defendants "departed radically and fundamentally from the characteristic usages, customs, doctrines and practices of the [church.]" *Id.* at 308, 200 S.E.2d at 643.

Our Supreme Court applied the Supreme Court of the United States' decision in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 21 L.Ed.2d 658

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(2018) (holding plaintiffs' claim they were improperly excluded from church even though they did not "take any action to have themselves removed from church membership" was ecclesiastical matter under above definitions) (citation omitted).

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(1969), reasoning that “questions must be resolved on the basis of [neutral] principles of law”—principles “developed for use in all property disputes.” *Id.* at 319, 200 S.E.2d at 650 (citation omitted). For example, courts could determine “(1) [w]ho constitutes the governing body of this particular [] church, and (2) who has that governing body determined to be entitled to use the properties.” In contrast, the First Amendment and Article I, Section 13 of the Constitution of North Carolina prohibit a decision of property rights based on “a judicial determination that one group of claimants has adhered faithfully to the fundamental faiths, doctrines and practices of the church . . . while the other group of claimants has departed substantially therefrom.” *Id.* at 318, 200 S.E.2d at 649. Although our Supreme Court noted that the plaintiffs could have prevailed “by showing that such action was not taken in a meeting duly called and conducted according to the procedures of the church,” *id.* at 320, 200 S.E.2d at 651, it concluded there was no evidence in the record to support such assertion and the trial court’s opinion must have been based on an inquiry barred by the ecclesiastical entanglement doctrine. *Id.* at 321, 200 S.E.2d at 651.

Notably, *Atkins* does not bar all inquiries in disputes over church property merely because the property is church property, the parties are religious members and organizations, or the dispute arose in a religious context. Rather, our Supreme Court held that “[i]t nevertheless remains the duty of civil courts to determine controversies concerning property rights over which such courts have jurisdiction and which are properly brought before them[.]” *Id.* at 318, 200 S.E.2d at 649. Relying on *Presbyterian*, our Supreme Court stated that “[n]either the First Amendment to the Constitution of the United States nor the comparable provision in Article I, Section 13, of the Constitution of North Carolina deprives those entitled to the use and control of church property of protections afforded by government to all property owners alike, such as . . . access to the courts for the determination of contract and property rights.” *Id.* at 318, 200 S.E.2d at 649. In conclusion, “[w]here civil, contract[, or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic form and rules.” *Id.* at 320, 200 S.E.2d at 650 (quoting *W. Conference of Original Free Will Baptists v. Creech*, 256 N.C. 128, 140-41, 123 S.E.2d 619, 627 (1962)).

In *Harris v. Matthews*, our Supreme Court reaffirmed the principles of *Atkins* and applied them to a new cause of action—a claim for breach of fiduciary duty by a minority faction of a congregational church against the pastor, secretary, and chair of the board of trustees, based on the allegation that the pastor-defendant “ha[d] usurped the governmental

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authority of the church's internal governing body." *Harris*, 361 N.C. at 272, 643 S.E.2d at 571. The Supreme Court noted that the plaintiffs claimed the defendants breached their fiduciary duty "by improperly using church funds, which constitutes conversion." *Id.* at 273, 643 S.E.2d at 571. Our Supreme Court held that the issue of whether the expenditures were proper could not be resolved by neutral principles of law because "[d]etermining whether actions, including expenditures, by a church's pastor, secretary, and chairman of the Board of Trustees were proper requires an examination of the church's view of the role of the pastor, staff, and church leaders, their authority and compensation, and church management[.]" and "[b]ecause a church's religious doctrine and practice affects its understanding of each of these concepts[.]" *Id.* at 273, 643 S.E.2d at 571. Although the ecclesiastical entanglement doctrine barred the claim at issue, the *Harris* Court reaffirmed that "[w]here civil, contract[,] or property rights are involved, the courts will inquire as to whether the church tribunal acted within the scope of its authority and observed its own organic forms and rules." *Id.* at 274-75, 643 S.E.2d at 572 (citation omitted).

This Court has applied the principles of the ecclesiastical entanglement doctrine in *Atkins* and *Harris* to other causes of action and clarified the test for whether the ecclesiastical entanglement doctrine will bar courts from considering a claim. In the leading case of *Smith v. Privette*, the plaintiffs, former church employees, sued a United Methodist Church, the District of the North Carolina Conference of the United Methodist Church, and the North Carolina Conference of the United Methodist Church (together, "church defendants"), alleging claims for negligent retention and supervision based on sexual misconduct by a pastor against the employees. Reversing the trial court, this Court held the ecclesiastical entanglement doctrine under the First Amendment did not bar courts from deciding the negligent retention and supervision claims. *Smith*, 128 N.C. App. at 495, 495 S.E.2d at 398. This Court held that, in determining whether the ecclesiastical entanglement doctrine would bar a claim, it must answer "the dispositive question" of "whether resolution of the legal claim requires the court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim." *Id.* at 494, 495 S.E.2d at 398 (citing *Milivojevic*, 426 U.S. at 710, 49 L.Ed.2d at 163). This Court applied that test and held that while "the decision to hire or discharge a minister is inextricable from religious doctrine and protected by the First Amendment from judicial inquiry," the plaintiffs' claim, rather than requiring "the trial court to inquire into the [c]hurch [d]efendants' reasons for choosing Privette to serve as

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a minister,” “instead presents the issue of whether the [c]hurch [d]efendants knew or had reason to know of Privette’s propensity to engage in sexual misconduct,” which is “conduct that the [c]hurch [d]efendants do not claim is part of the tenets or practices of the Methodist Church.” *Id.* at 495, 495 S.E.2d at 398 (internal citation omitted). Therefore, “there [wa]s no necessity for the court to interpret or weigh church doctrine in its adjudication of the [p]laintiffs’ claim for negligent retention and supervision.” *Id.* at 495, 495 S.E.2d at 398. In so holding, this Court noted that “[t]he First Amendment . . . does not grant religious organizations absolute immunity from liability.” *Id.* at 494, 495 S.E.2d at 397. “Indeed, the application of a secular standard to secular conduct that is tortious is not prohibited by the Constitution.” *Smith*, N.C. App. at 494, 495 S.E.2d at 397 (internal citations and quotation marks omitted).

In *Emory v. Jackson Chapel First Missionary Baptist Church*, the plaintiff church members brought an action against the church and the pastor, alleging they provided insufficient notice to plaintiffs as required by the church bylaws for a meeting at which the church altered its corporate structure and that defendants also violated the plaintiffs’ contractual and property rights by failing to follow the procedure. This Court explicitly noted that “[o]ur Supreme Court has held that a trial court’s exercise of jurisdiction is improper only where ‘purely ecclesiastical questions and controversies are involved.’ ” *Id.* at 492, 598 S.E.2d at 670 (quoting *W. Conference of Original Free Will Baptists of N.C. v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962)). This Court held the ecclesiastical entanglement doctrine barred the trial court from determining whether the defendants provided the plaintiffs with sufficient notice under the bylaws, because ambiguities existed in the bylaws and “long-established church customs exist[ed] that may [have] alter[ed] the interpretation of the notice requirements [in the bylaws].” *Id.* at 492, 165 N.C. App. at 670. Thus, “the trial court would be required to delve into ‘ecclesiastical matters’ regarding how the church interprets the [] notice requirements and types of meetings [in the bylaws.]” *Id.* at 493, 598 S.E.2d at 671 (quoting *Piner*, 267 N.C. at 77, 147 S.E.2d at 583). In addition, this Court noted that, while plaintiffs asserted contract and property rights were implicated, the “heart of this matter [wa]s a change in the structure of the church” and “the claims of [the] plaintiffs [] only tangentially affect[ed] property rights.” *Id.* at 494, 495, 598 S.E.2d at 671, 672. Thus, there was no “substantial property right” affected by the incorporation and the trial court properly held the ecclesiastical entanglement doctrine barred the claim. *Id.* at 495, 598 S.E.2d at 672.

Although the plaintiffs’ claims in *Emory* “only tangentially affect[ed] property rights,” *id.* at 495, 598 S.E.2d at 672, this Court has clarified the



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relationship between church membership as an ecclesiastical matter and property rights in subsequent cases. In *Tubiolo v. Abundant Life Church, Inc.*, 167 N.C. App. 324, 605 S.E.2d 161 (2004), we held that “membership in a church is a core ecclesiastical matter[,]” and “[i]t is an area where the courts of this State should not become involved.” *Tubiolo*, 167 N.C. App. at 328, 605 S.E.2d at 164. However, we also held that “the plaintiffs’ membership in the defendant is in the nature of a property interest, and that the courts do have jurisdiction over the very narrow issue of whether the bylaws were properly adopted by the defendant.” *Id.* at 329, 605 S.E.2d at 164 (citing *Bouldin v. Alexander*, 82 U.S. 131, 139-40, 21 L.Ed. 69, 71-72 (1872)). Therefore, the case was distinguishable from *Emory*, because membership rights were implicated and “[t]his inquiry [into whether the bylaws were properly adopted] can be made without resolving any ecclesiastical or doctrinal matters.” *Id.* at 329, 605 S.E.2d at 164-65. Nevertheless, this Court provided an important caveat on *Tubiolo* in *Azige v. Holy Trinity Ethiopian Orthodox Tewahdo Church*, 249 N.C. App. 236, 790 S.E.2d 570 (2016), where we held that the trial court was barred from considering issues based on church membership status because the issues “would require interpretation of [church] bylaws which do impose doctrinal requirements.” *Azige*, 249 N.C. App. at 242, 790 S.E.2d at 575. For example, “[t]he courts c[ould] not determine the ‘immoral behavior’ of plaintiffs for purposes of the bylaws . . . .” *Id.* at 244, 790 S.E.2d at 575. These claims “raise questions which . . . would ‘require[] the court to interpret or weigh church doctrine’ in contravention of the First Amendment,” violating the test in *Smith*. *Id.* at 244, 790 S.E.2d at 575 (quoting *Davis v. Williams*, 242 N.C. App. 262, 892, 774 S.E.2d 889, 892 (2015)).

Besides property claims which involve ecclesiastical matters, this Court has also addressed tort and contract claims under the ecclesiastical entanglement doctrine. In *Doe v. Diocese of Raleigh*, the plaintiff filed complaints against the Diocese of Raleigh, the Bishop of the Diocese, and a priest of the diocese alleging, among other claims, claims for negligence against the Diocese and the Bishop, arguing they negligently supervised the priest and failed to educate the plaintiff about boundaries or require STD testing by the priest. *Doe*, 242 N.C. App. at 43-44, 776 S.E.2d at 32-33. Relying on *Smith* and *Harris*, this Court “examine[d] each of [the p]laintiff’s remaining causes of action against the Diocese [d]efendants in order to determine whether its adjudication would require ‘an impermissible analysis by the court based on religious doctrine or practice.’ ” See *id.* at 49, 776 S.E.2d at 36 (citing *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 711, 714 S.E.2d 806, 810 (2011); *Harris*, 361 N.C. at 274, 643 S.E.2d at 572).

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As to the claim for negligent supervision, this Court analogized to the negligent supervision claim in *Smith* and held that in *Doe*, as in *Smith*, the ecclesiastical entanglement doctrine did not bar courts from determining whether the elements of negligent supervision could be established because, in both cases, there was a “commonsense understanding that *sexual misconduct* is not ‘part of the tenets or practices of the [church.]’ ” *Id.* at 54, 776 S.E.2d at 38-39. Furthermore, this Court held that adjudicating the negligent supervision claim would not require the trial court to determine issues that “are inextricably bound up with church doctrine,” “such as (1) whether [the priest] should have ever been incardinated; (2) whether he should have been allowed to remain a priest; or (3) whether his relationship with the Diocese should have been severed.” *Id.* at 55, 776 S.E.2d at 39. “[T]he issue to be determined in connection with [the p]laintiff’s negligent supervision claim [wa]s a purely secular one.” *Id.* at 55, 776 S.E.2d at 39.

In contrast, this Court held courts were barred from considering plaintiff’s claim that the Diocese negligently failed to compel the priest to undergo STD testing because “this theory of liability *is premised on* the tenets of the Catholic church—namely, the degree of control existing in the relationship between a bishop and a priest,” and it “seeks to impose liability based on the Diocese [d]efendants’ alleged failure to exercise their authority over a priest stemming from an oath of obedience taken by him pursuant to the church’s canon law.” *Id.* at 56, 776 S.E.2d at 40 (emphasis in original). Thus, this claim fails because “a civil court is constitutionally prohibited from ‘interpos[ing] its judgment’ on the proper role of church leaders and the scope of their authority ‘[b]ecause a church’s religious doctrine and practice affect its understanding of each of these concepts.’ ” *Id.* at 56, 776 S.E.2d at 40 (quoting *Harris*, 361 N.C. at 273, 643 S.E.2d at 571).

Finally, this Court addressed a claim for breach of contract in *Bigelow v. Sassafras Grove Baptist Church*, 247 N.C. App. 401, 786 S.E.2d 358 (2016). In *Bigelow*, a pastor claimed the defendants, a Baptist church and its deacons, breached a contract and violated the North Carolina Wage and Hour Act by failing to pay him compensation and benefits after he became ill pursuant to a written contract entered into between himself and the defendants. *Bigelow*, 247 N.C. App. at 402, 786 S.E.2d at 360. This Court held the argument that “the First Amendment of the United States Constitution immunizes, without exception, a religious institution from liability arising out of a contract between the religious institution and its ministerial employees,” was inconsistent with *Smith*. *Id.* at 411, 786 S.E.2d at 366. Furthermore, this Court held the plaintiff’s claims did not “ask[] the court to address ecclesiastical



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doctrine or church law”; rather, they “require[d] the court only to make a secular decision regarding the terms of the parties’ contract and to apply the neutral principles of the Wage and Hour Act.” *Id.* at 411-12, 786 S.E.2d at 366. Therefore, the ecclesiastical entanglement doctrine did not bar courts from considering the plaintiffs’ contract claims.

**B. Application of Ecclesiastical Entanglement Doctrine to Defamation Claims**

In summary, although the issue of the application of the ecclesiastical entanglement doctrine to defamation claims is a question of first impression for North Carolina, our state’s extensive caselaw on the doctrine is “equally applicable here.” *See Doe*, 242 N.C. App. at 49, 776 S.E.2d at 36.

Our courts must look to the specific elements of the cause of action to determine whether “neutral principles of law exist to resolve plaintiffs’ claims.” *Harris*, 361 N.C. at 273-74, 643 S.E.2d at 571. For instance, in *Harris*, our Supreme Court looked to the specific elements of the cause of action for breach of fiduciary duty and, in particular, the specific theory under the element of breach advanced by the plaintiff (i.e., “improperly using church funds,” or “conversion”) in order to determine whether the ecclesiastical entanglement doctrine would bar the claim. *See id.* at 273, 643 S.E.2d at 571. Because resolving that specific element would require courts to determine whether actions by the church leadership were “proper” based on the church’s view of the roles of those individuals, the Supreme Court held the claim in that case was barred. *Id.* at 273, 643 S.E.2d at 571. Our courts have first identified the cause of action and the specific elements of that claim at issue in determining whether the claim is barred by the ecclesiastical entanglement doctrine. Our courts then determine whether “neutral principles of law exist to resolve plaintiffs’ claims.” *Harris*, 361 N.C. at 273-74, 643 S.E.2d at 572; *see Atkins*, 284 N.C. at 319, 200 S.E.2d at 650 (“[D]eterminations must be made pursuant to ‘neutral principles of law, developed for use in all property disputes.’” (citation omitted)). This Court has held that we must answer “[t]he dispositive question” of “whether resolution of the legal claim requires the court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim.” *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398 (citing *Milivojeovich*, 426 U.S. at 710, 49 L.Ed.2d at 163).

In the present case, Plaintiffs allege multiple claims for defamation, including libel and slander *per se* and libel and slander *per quod*. “In order to recover for defamation, a plaintiff generally must show that the defendant caused injury to the plaintiff by making false, defamatory

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statements of or concerning the plaintiff, which were published to a third person.” *Desmond v. News and Observer Pub. Co.*, 241 N.C. App. 10, 16, 772 S.E.2d 128, 135 (2015) (citation omitted). The only element of defamation that Defendants argue violates the ecclesiastical entanglement doctrine is the first element: the falsity of the alleged statement. I would hold that, in order to determine whether courts are barred from considering a claim for defamation, they must evaluate the specific elements of the claim, including the falsity of the alleged statement, and determine whether “resolution of [the truth or falsity of the alleged statement] requires the court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim.” *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398. However, if resolution of the claim would require courts to interpret or weigh church doctrine, the ecclesiastical entanglement doctrine under the First Amendment and Article I, Section 13 of the Constitution of North Carolina prohibit them from adjudicating the claim.

This statement of the law, grounded in our Court’s precedent and first adopted from United States Supreme Court precedent, is more consistent with precedent than that adopted in the majority’s opinion, which states that “[f]or defamation claims, we must consider whether a statement is true or false without examining or inquiring into ecclesiastical matters or church doctrine.” The majority’s imprecise rule conflates the broad prohibition against courts becoming entangled in “ecclesiastical matters” with the test adopted in *Smith* for determining whether “neutral principles of law are properly applied to adjudicate the claim.” *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398 (citing *Milivojeovich*, 426 U.S. at 710, 49 L.Ed.2d at 163). Where neutral principles of law can be applied, resolving the claim would not impermissibly entangle the court in ecclesiastical matters. For instance, in *Tubiolo*, this Court held that “[m]embership in a church is a core ecclesiastical matter.” *Tubiolo*, 167 N.C. App. at 328, 605 S.E.2d at 164. We nevertheless held that “the plaintiffs’ membership in [a church] is in the nature of a property interest, and [t]he courts do have jurisdiction over the very narrow issue of whether the bylaws were properly adopted by the [church].” *Tubiolo*, 167 N.C. App. at 329, 605 S.E.2d at 164.

The majority incorrectly asserts, relying on *Doe*, that “[o]nly when an ‘issue to be determined in connection with [a party’s] claim is a *purely secular* one,’ then “[n]eutral principles of law govern th[e] inquiry and . . . subject matter jurisdiction exists in the trial court over th[e] claim.” (emphasis in original) (quoting *Doe*, 242 N.C. App. at 55, 776 S.E.2d at 39). This is a misstatement of *Doe* and contrary to *Emory* where this

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Court noted that “[o]ur Supreme Court has held that a trial court’s exercise of jurisdiction is improper only where ‘purely ecclesiastical questions and controversies are involved.’” *Emory*, 165 N.C. App. at 492, 598 S.E.2d at 670 (quoting *Creech*, 256 N.C. at 140, 123 S.E.2d at 627); accord *W. Conference of Original Free Will Baptists v. Creech*, 256 N.C. 128, 140, 123 S.E.2d 619, 627 (1962) (“The legal or temporal tribunals of the State have no jurisdiction over, and no concern with, purely ecclesiastical questions and controversies . . . but the courts do have jurisdiction, as to civil, contract[,] and property rights which are involved in, or arise from, a church controversy.” (quoting *Reid*, 241 N.C. 201, 85 S.E.2d 114)). Under *Doe*, while a claim being “purely secular” is a sufficient condition to avoid the ecclesiastical entanglement doctrine, it is not a necessary one, and there may at times be a gray area of questions between those that are “purely secular” and “purely ecclesiastical.”

The majority’s approach to defamation claims does not consider our precedent which provides that “the courts do have jurisdiction, as to *civil*, contract[,] and property rights which are involved in, or arise from, a *church controversy*.” *Creech*, 256 N.C. at 140, 123 S.E.2d at 627 (emphasis added) (quoting *Reid*, 241 N.C. 201, 85 S.E.2d 114). Where “neutral principles of law exist to resolve plaintiffs’ claims,” *Harris*, 361 N.C. at 273-74, 643 S.E.2d at 571-72, courts have not only the power but the duty to resolve the plaintiffs’ claims, because “[n]either the First Amendment to the Constitution of the United States nor the comparable provision in Article I, Section 13, of the Constitution of North Carolina deprives [participants in religious life] of protections afforded by government to all . . . , such as . . . access to the courts for the determination of [civil, ]contract[,] and property rights.” *Atkins*, 284 N.C. at 318, 200 S.E.2d at 649. In the case of defamation claims, I would hold that neutral principles of law exist and the ecclesiastical entanglement doctrine does not bar a claim where resolving the claim’s elements, including determining the truth or falsity of the alleged defamatory statement, would not require the court to interpret or weigh church doctrine.

C. Analysis of Plaintiffs’ Claims

I concur in the majority’s analysis of Plaintiffs’ defamation claims based on statements made by Mr. Holleman in the 13 November 2012 Letter, the 28 November 2012 Sermon, the Ballot and Absentee Ballot, claims based on four statements made in the 16 January 2013 letter Mr. Holleman sent to Mr. Brewer, and the claim based on a statement made in the 25 April 2013 letter Mr. Holleman sent to Mr. Myers. Analyzing these statements would require our courts to “interpret or weigh church doctrine,” and, therefore, resolving the claims would

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impermissibly entangle courts in ecclesiastical questions in violation of the First Amendment and Article I, Section 13 of the Constitution of North Carolina.

I disagree with the majority's analysis of Plaintiffs' defamation claims based on the 23 December 2012 oral statement allegedly made by Mr. Hix to an unidentified congregant; the statement in the 8 January 2013 email to Mr. Brewer, a church choir member; one claim based on a statement made in the 16 January 2013 letter Mr. Holleman sent to Mr. Brewer; and the claim based on a statement made in the 6 April 2013 email Mr. Holleman also sent to Mr. Brewer. In its analysis of these statements, the majority expands the ecclesiastical entanglement doctrine to bar defamation claims that can be resolved by the application of neutral principles of law. I will analyze these statements in turn.

(1) 23 December 2012 Alleged Oral Statement by Mr. Hix

Plaintiffs argue the following statement they allege Mr. Hix made to an unidentified DHBC congregant on 23 December 2012 is defamatory: "[Mr.] Lippard is a liar and you and other people like you are believing him instead of Scripture." In response, Defendants argue the statement "was made in the context of Mr. Hix's interpretation of and Mr. Lippard's compliance with Scripture" and that "[a]n inquiry into the falsity of the statement would require a comparison of Mr. Lippard's conduct with Scripture, which also prohibits lying. (*E.g.*, *Rev.* 21:8)" The majority argues that "we would need to inquire into DHBC's definition of lying, when to believe scripture, and how scripture determines whom to believe," and that "[t]his is an issue over DHBC's internal customs, practices, morality, and degree of control between members."

This statement contains two independent clauses, each with a complete thought. First, I would hold that courts would not have to interpret or weigh church doctrine in order to determine the truth or falsity of the first part of the claim, that "[Mr.] Lippard is a liar." Contrary to the arguments of Defendants and the majority, the meaning of "liar" in this alleged oral statement is not ambiguous and would not require interpretation of the Book of Revelation, or interpretation or weighing of "DHBC's definition of lying" to determine. In interpreting allegedly defamatory statements, our courts construe the meaning of statements "as ordinary people would understand" them. *Renwick v. News and Observer Pub. Co.*, 310 N.C. 312, 319, 312 S.E.2d 405, 409 (1984). In ordinary usage, "liar" means "a person who tells lies," and "lie" means, *inter alia*, "an assertion of something known or believed by the speaker to be untrue with intent to deceive." See *Merriam-Webster's Collegiate Dictionary* 716, 717 (11th Ed. 2003). Although Mr. Hix is an employee of

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DHBC, there is no indication that there is a special “definition of lying” unique to DHBC. Therefore, I would hold courts are not barred from determining a claim based on the alleged statement by Mr. Hix that Mr. Lippard is a liar.

Second, the majority argues that “you and other people like you are believing him instead of Scripture” means that “we would need to inquire into . . . when to believe scripture, and how scripture determines whom to believe[,]” to determine the truth or falsity of the claim that Mr. Lippard is a liar. However, courts would only need to determine whether Mr. Lippard knowingly made factually untrue statements with the intent to deceive or not, an inquiry which does not require interpreting or weighing church doctrine. I would hold the second phrase does not sufficiently allege a defamation claim against Mr. Lippard because it is a statement of opinion and not fact and does not target Mr. Lippard, but other unnamed churchgoers. Assuming the alleged statement is capable of verification and directed against Mr. Lippard, I would hold considering the particular implied claim that Mr. Lippard is not following scripture is barred by the ecclesiastical entanglement doctrine, as courts cannot determine whether Mr. Lippard is contravening scripture without inquiring into what scripture requires.

That this claim would be barred does not affect the alleged statement that Mr. Lippard is a liar. In a footnote, the majority argues that “[w]e cannot separate the 23 December 2012 statement into two parts and must read it as a whole because it is a complete sentence without a comma that would indicate a compound sentence of thoughts.” I would not hold the absence of a comma in a written allegation of an oral statement is dispositive of its interpretation; rather, because both conjuncts can stand alone as individual sentences, they are independent clauses and each expresses a complete thought. But even taken as a whole, in the alleged statement Mr. Hix still accuses Mr. Lippard of being a liar, an allegation courts are capable of determining the truth or falsity of which without weighing church doctrine. Therefore, I would hold the ecclesiastical entanglement doctrine cannot bar Plaintiffs’ claim that Mr. Hix defamed Mr. Lippard by claiming he was a liar.

(2) 8 January 2013 Email by Mr. Hix to Mr. Brewer

Plaintiffs also allege defamation based on Mr. Hix’s statement in a subsequent email to Mr. Brewer, a choir member, stating: “Note also that there are verifiable facts and Biblical scriptures which [Plaintiffs] are openly denying and defying. Those facts and scriptures still stand.” This statement, like the last by Mr. Hix, mixes allegations that Plaintiffs are lying—“there are verifiable facts . . . which [Plaintiffs] are openly

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denying . . .”—with allegations that Plaintiffs are contravening scriptural requirements—“there are . . . Biblical scriptures which [Plaintiffs] are openly . . . defying.” At deposition, Mr. Hix said “[t]he facts that the (sic) late and/or not showing up for worship services when we’re paying her to be on the schedule” were the “verifiable facts” to which he was referring. Here, as in the previous statement, I would hold that courts are not barred from considering a defamation claim based on the allegation that Plaintiffs are “openly denying” “verifiable facts,” or lying. I would hold that determining the truth or falsity of whether Plaintiffs were “openly denying” the “verifiable fact” that Ms. Lippard was repeatedly late or not showing up for worship services would not require courts to interpret or weigh church doctrine and courts are not barred from making that limited inquiry.

(3) 16 January 2013 Letter by Mr. Holleman to Mr. Brewer

Mr. Holleman sent a lengthy letter on 16 January 2013 to Mr. Brewer. Plaintiffs argue, among others, five statements contained in the letter are defamatory. Defendants contend courts are barred from considering each of these statements based on the ecclesiastical entanglement doctrine. While I concur with the majority that courts are barred from considering four of the statements because they would require courts to interpret or weigh church doctrine, I disagree with the majority’s holding that courts are barred from considering the following statement written by Mr. Holleman: “No doubt there are more strategies against the church leadership playing out tonight.” I would hold courts are not barred from considering this claim because determining the truth or falsity of whether “there [were] more strategies against the church leadership playing out” would not require the interpretation or weighing of church doctrine. The letter stated in pertinent part:

[A]s far as I’m aware, every new conversation or controversy has been initiated by [the Plaintiffs], or by those who have been advocating for their position [as opposed to the church leadership]. You yourself have attempted to engage me in conversation at the church. . . . You have written this letter and had it delivered to me, Bryan Sherrill, and Bill Wooten. [Mr. Lippard] has confronted [Mr. Hix] multiple times, and this very day, I’ve met with Billy Lynch for breakfast, whom [Mr. Lippard] had confronted at Church with a copy of [Mr. Hix’s] directives to [Ms. Lippard]. I’ve learned that [Mr. Lippard] has e-mailed [Mr. Hix] requesting an explanation for why he and [Ms. Lippard] have not been returned to the solo rotation. And Bryan Sherrill indicates that [Mr. Lippard] called him today attempting to “catch” me in some mistake. These are just a few. No

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doubt there are more strategies against the church leadership playing out tonight.

In their brief, Plaintiffs argue this statement implies “nefarious motives ascribed to Ms. Lippard by [Mr.] Holleman.” The context of the statement makes clear that “strategies” in this context means “a careful plan or method” and “a clever stratagem,” here with a negative connotation. *See Merriam-Webster’s Collegiate Dictionary* 1233 (11th Ed. 2003). Mr. Holleman is accusing Ms. Lippard of coordinating the meetings and stirring dissension. The truth or falsity of the statement that “there [were] more strategies against the church leadership playing out [that ] night” could be determined by a court without inquiring into religious doctrine or practice, such as by determining whether Ms. Lippard asked or instructed others to communicate on her behalf or to actively oppose the action of the church leadership. Therefore, I would hold the claim is not barred by the ecclesiastical entanglement doctrine.

Although the majority concedes that this statement “does not directly [involve] scripture” it nevertheless argues that “it does involve other ecclesiastical matters.” However, the majority does not rely on the definition of “ecclesiastical matter” adopted by our Supreme Court. It does not argue that this is a matter “which concerns . . . the adoption and enforcement within a religious association of needful laws and regulations for the government of membership[,]” nor that it concerns “the power of excluding from such associations those deemed unworthy of membership by the legally constituted authorities of the church . . . .” *Piner*, 257 N.C. at 77, 147 S.E.2d at 583. The Plaintiffs’ claim that this statement is defamatory is neither.

Instead, the majority asserts that “[p]lainly, this controversy and ongoing dispute with the Plaintiffs is a matter of DHBC’s internal membership, organization, governance, discipline, and degree of control between members” and that “[w]e cannot decide the rightness or wrongness of this statement by a pastor communicating with his flock.” “[B]ut,” contrary to the majority’s argument, “the courts do have jurisdiction, as to *civil*, contract[,] and property rights which are involved in, or arise from, a *church controversy*.” *Creech*, 256 N.C. at 140, 123 S.E.2d at 627 (emphasis added) (quoting *Reid*, 241 N.C. 201, 85 S.E.2d 114). An act that would otherwise give rise to an actionable tort claim is not immunized merely because it arose in the context of a communication between a pastor and a churchgoer where neutral principles of law could be applied to resolve the claim. *See Smith*, 128 N.C. App. at 495, 495 S.E.2d at 398 (concluding that a holding “that a religious body must be held free from any responsibility for wholly predictable and



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foreseeable injurious consequences of personnel decisions, although such decisions incorporate no theological or dogmatic tenets—would go beyond First Amendment protection and cloak such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded.” (internal citation omitted)); *accord Bigelow*, 247 N.C. App. at 411, 786 S.E.2d at 366 (holding “unsupported assertion” that First Amendment “immunizes, without exception, a religious institution from liability arising out of a contract between the religious institution and its ministerial employees . . . cannot be reconciled with *Smith*.”). Contrary to the majority’s argument, resolving this claim does not require courts to determine the “rightness or wrongness” of the pastor’s statement; resolving the claim merely requires that courts determine the truth or falsity of it. That particular question “does not directly [involve] scripture,” as the majority concedes, and would not require courts to interpret or weigh church doctrine. Therefore, I would hold it can be resolved by the application of neutral principles of law and is not barred by the ecclesiastical entanglement doctrine.

(4) 6 April 2013 Email by Mr. Holleman to Mr. Brewer

Finally, the Plaintiffs also argue that the following statement in the 6 April 2013 email to Mr. Brewer was defamatory:

There were several there the Wednesday night that [Mr. Lippard], with [Ms. Lippard] behind him, blocked [Mr. Hix’s] exit from the music room and was aggressively going after [Mr. Hix], pointing his finger in [Mr. Hix’s] face, an action I recently learned was illegal and could have very well been reported as a crime.

Determining the truth or falsity of this allegation of the commission of an allegedly criminal act would not require courts to interpret or weigh church doctrine any more than the same accusation from any other person based on any other crime would. The statement does not allege that Plaintiffs violated an ecclesiastical law, which would require such interpretation or weighing of doctrine. Rather, determining the truth or falsity of this statement merely requires courts to determine whether or not Mr. Lippard in fact “blocked [Mr. Hix’s] exit from the music room and [aggressively] [went] after [Mr. Hix], pointing his finger in [Mr. Hix’s] face.” Therefore, I would hold this claim could be resolved based on the application of neutral principles of law and is not barred by the ecclesiastical entanglement doctrine.

The majority argues deciding this particular claim is indistinguishable from *Harris* because “we would be forced to determine whether



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the statement at issue is proper in light of DHBC's doctrine and practice regarding membership and conduct." This is a misreading of *Harris*. In *Harris*, the reason the court would have had to inquire into whether expenditures made by the church leadership were "proper" to resolve the claim was because the cause of action the plaintiffs alleged was breach of fiduciary duty, and the only theory alleged by the plaintiffs for the specific element of breach of fiduciary duty was that the defendants "improperly us[ed] church funds, which constitutes conversion." *Harris*, 361 N.C. at 273, 643 S.E.2d at 572. Therefore, determining whether the church leadership's challenged action was proper was an essential issue to the claim before the court. Here, in contrast, the issue is whether Mr. Holleman's statement about Plaintiffs was true or false; the court need not determine whether this statement or Mr. Holleman's actions were "proper" or consider "how [DHBC] should react to what it considers improper conduct" to resolve the claim.

I would hold that Plaintiffs' claims based on these statements are not barred by the ecclesiastical entanglement doctrine because courts could evaluate the specific elements of each of these claims, including the falsity of the alleged statement, without interpreting or weighing church doctrine. Therefore, "the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim[s]." *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398; *see Harris*, 361 N.C. at 273-74, 643 S.E.2d at 571 (holding claims barred by ecclesiastical entanglement doctrine "[b]ecause no neutral principles of law exist to resolve plaintiffs' claims.").

D. Substantive Defamation Claims

Although I concur with the majority that the ecclesiastical entanglement doctrine bars courts from analyzing most of Plaintiffs' claims, and I dissent and would hold that four claims are not barred, there remain other issues to resolve. In granting summary judgment to Defendants, the trial court also held (1) "[a]s a matter of law, none of the Defendants' statements are defamatory *per se*" and (2) "Plaintiffs did not provide any evidentiary forecast that they suffered special damages because of any of Defendants' allegedly defamatory *per quod* statements." On appeal, Plaintiffs argue that they "have met all the elements of defamation cases [(sic)] whether *per se*, or *per quod*." I disagree, and I would hold that, for the claims that I believe are not barred by the ecclesiastical entanglement doctrine, Plaintiffs have failed to show the claims constitute libel or slander *per se* or *per quod*.

"Three classes of libel are recognized under North Carolina law." *Renwick*, 310 N.C. at 316, 312 S.E.2d at 408.

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They are: (1) publications obviously defamatory which are called libel *per se*; (2) publications susceptible of two interpretations one of which is defamatory and the other not; and (3) publications not obviously defamatory but when considered with innuendo, colloquium, and explanatory circumstances become libelous, which are termed libels *per quod*.<sup>3</sup>

*Id.* at 316, 312 S.E.2d at 408 (quoting *Arnold v. Sharpe*, 296 N.C. 533, 537, 251 S.E.2d 452, 455 (1979)).

Libel *per se* is a publication which, when considered alone without explanatory circumstances: (1) charges that a person has committed an infamous crime; (2) charges a person with having an infectious disease; (3) tends to impeach a person in that person's trade or profession; or (4) otherwise tends to subject one to ridicule, contempt or disgrace.

*Skinner v. Reynolds*, 237 N.C. App. 150, 152, 764 S.E.2d 652, 655 (2014) (citations omitted) (emphasis omitted).

Further: [] Defamatory words to be libelous *per se* must be susceptible of but one meaning and of such nature that the court can presume as a matter of law that they tend to disgrace and degrade the party or hold him up to public hatred, contempt or ridicule, or cause him to be shunned and avoided. Although someone cannot preface an otherwise defamatory statement with 'in my opinion' and claim immunity from liability, a pure expression of opinion is protected because it fails to assert actual fact. This Court considers how the alleged defamatory publication would have been understood by an average reader. In addition, the alleged defamatory statements must be construed only in the context of the document in which they are contained, stripped of all insinuations, innuendo, colloquium and explanatory circumstances. The articles must be defamatory on its face within the four corners thereof.

*Id.* at 152-53, 764 S.E.2d at 655 (internal citations and quotations omitted) (emphasis omitted).

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3. In contrast, slander—an "oral defamatory utterance[]"—is only actionable *per se* or *per quod*, not as a publication susceptible of two interpretations. *Penner v. Elliott*, 225 N.C. 33, 34, 33 S.E.2d 124, 125 (1945).

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In their brief, Plaintiffs do not identify which of the dozens of allegedly defamatory statements they cite are defamatory *per se*. Upon my review of the record and the briefs, the only statement not barred by the ecclesiastical entanglement doctrine that Plaintiffs might colorably argue was libel *per se* was Mr. Holleman’s description of Plaintiffs’ alleged behavior in the 6 April email to Mr. Brewer, which Mr. Holleman characterized as “illegal” and “could very well have been reported as a crime.”<sup>4</sup> There is a question as to whether the behavior alleged—“block[ing] [Mr. Hix’s] exit from the music room,” “aggressively going after [Mr. Hix],” and “pointing his finger in [Mr. Hix’s] face”—constitutes an “infamous crime.”

“At common law, . . . an infamous crime is one whose commission brings infamy upon a convicted person, rendering him unfit and incompetent to testify as a witness, such crimes being treason, felony, and *crimen falsi*.” *Aycock v. Padgett*, 134 N.C. App. 164, 166, 516 S.E.2d 907, 909 (1999) (citations omitted). Under N.C. Gen. Stat. § 14-39 (2017), the felony of kidnapping includes an “unlawful[] confine[ment], restrain[t], or remov[al] from one place to another [of] any other person 16 years of age or over without the consent of such person” for one of several enumerated purposes. False imprisonment is a lesser included offense of kidnapping. *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 562 (1992). “The difference between kidnapping and the lesser included offense of false imprisonment is the purpose of the confinement, restraint, or removal of another person: the offense is kidnapping if the purpose of the restraint was to accomplish one of the purposes enumerated in the kidnapping statute.” *Id.* at 210, 415 S.E.2d at 562 (citation omitted). False imprisonment was a misdemeanor at common law and, as it was not superseded by N.C.G.S. § 14-39, remains so in North Carolina. See *State v. Fulcher*, 34 N.C. App. 233, 242, 237 S.E.2d 909, 915 (1977), affirmed by *State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978) (“The common-law crime of false imprisonment, a general misdemeanor, has not been superseded by the new kidnapping statute because there may be an unlawful restraint without the purposes specified in the statute.”).

The conduct Mr. Holleman alleges occurred, being Mr. Holleman’s blocking of Mr. Hix in the music room with his body, does not rise to the level of kidnapping or false imprisonment, as there is nothing in the statement to indicate Mr. Hix was truly confined or restrained. Even

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4. Despite Plaintiffs’ repeated assertions, none of the statements alleged “tend[] to subject [Plaintiffs] to ridicule, contempt, or disgrace” as a matter of law. *Skinner*, 237 N.C. App. at 152, 764 S.E.2d at 655.

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assuming, *arguendo*, that Mr. Hix was confined against his will, there is no evidence in the statement by Mr. Holleman that he claimed Plaintiffs acted with one of the specific purposes enumerated in the kidnapping statute. *See* N.C.G.S. § 14-39. Therefore, at most, the conduct Mr. Holleman describes would be false imprisonment. As it is only a misdemeanor, not a felony, and not treason or a *crimen falsi*, false imprisonment is not an “infamous crime.” Therefore, the allegedly defamatory statement in the 6 April email, like the rest of the statements Plaintiffs allege were defamatory, is not libel *per se*.

Plaintiffs further contend the trial court erred in granting Defendants’ motion for summary judgment on the basis that Plaintiffs failed to “provide any evidentiary forecast that they suffered special damages because of any of Defendants’ allegedly defamatory *per quod* statements.” I disagree.

Libel *per quod* may be asserted when a publication is not obviously defamatory, but when considered in conjunction with innuendo, colloquium, and explanatory circumstances it becomes libelous. To state a claim for libel *per quod*, a party must specifically allege and prove special damages as to each plaintiff.

*Skinner*, 237 N.C. App. at 157, 764 S.E.2d at 657-58 (internal quotations and citations omitted). This Court has distinguished special damages from general damages as follows:

General damages are the natural and necessary result of the wrong, are implied by law, and may be recovered under a general allegation of damages. But special damages, those which do not necessarily result from the wrong, must be pleaded, and the facts giving rise to the special damages must be alleged so as to fairly inform the defendant of the scope of plaintiff’s demand.

*Griffin v. Holden*, 180 N.C. App. 129, 138, 636 S.E.2d 298, 305 (2006) (citing *Rodd v. W.H. King Drug Co.*, 30 N.C. App. 564, 568, 228 S.E.2d 35, 38 (1976)). “Special damage, as that term is used in the law of defamation means pecuniary loss, as distinguished from humiliation.” *Williams v. Rutherford Freight Lines, Inc.*, 10 N.C. App. 384, 387, 179 S.E.2d 319, 322 (1971) (citing *Penner v. Elliott*, 225 N.C. 33, 33 S.E.2d 125 (1945)) (additional citations omitted). Indeed, “emotional distress and mental suffering are not alone sufficient to establish a basis for relief in cases which are actionable only *per quod*.” *Id.* at 390, 179 S.E.2d at 324 (citations omitted). Of course, some pecuniary damages may stem from

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mental anguish and humiliation, such as the cost of psychological treatment attributable to the defamatory statement. *See, e.g., Tallent v. Blake*, 57 N.C. App. 249, 255, 291 S.E.2d 336, 340-41 (1982) (“Special damages include illness sufficient to require medical care and expense.”); *Araya v. Deep Dive Media, LLC*, 966 F. Supp. 2d 582, 599-600 (W.D.N.C. 2013) (holding that cost of treatment and psychological counseling for emotional distress satisfied requirement for special damages in libel *per quod* claim).

Furthermore, at summary judgment, a plaintiff must “produce an evidentiary forecast to support a *prima facie* showing of special damages to survive defendant’s motion for summary judgment on [a] claim of libel *per quod*.” *Griffin*, 180 N.C. App. at 138, 636 S.E.2d at 305 (citing *Renwick*, 310 N.C. at 312, 312 S.E.2d at 408 ). Mere allegations and “pure speculation” are insufficient at this stage. *Id.* at 138-39, 636 S.E.2d at 305. In the present case, Plaintiffs claim they have suffered “damages for injury to their reputation and mental anguish and humiliation,” in addition to seeking punitive damages and “full reimbursement of their attorney’s fees.” Mr. Lippard also claims that “his reputation as a builder home inspector and real estate agent has been tarnished as a result of the publication of [the 28 November sermon] and the other defamatory remarks attributed to [Defendants] against [Mr. Lippard].”

Plaintiffs fail to meet their burden of producing a forecast of evidence sufficient to make a *prima facie* showing of special damages. Mental anguish and humiliation are not sufficient to satisfy the requirement for special damages. *See Williams*, 10 N.C. App. at 387, 179 S.E.2d at 322. Rather, to survive a motion for summary judgment, Plaintiffs must show “pecuniary loss, as distinguished from humiliation.” *Williams*, 10 N.C. App. at 387, 179 S.E.2d at 322. However, despite their general allegation, Plaintiffs have failed to show any particular pecuniary damages arising from the mental anguish, emotional harm, and humiliation they claim to have suffered, such as costs for therapy or mental health care.

Mr. Lippard additionally claims that Defendants’ alleged statements have “tarnished” “his reputation as a builder, home inspector[,] and real estate agent,” and that his “yearly income from 2010 through 2016” is “proof of pecuniary injury as a result of the defamation of [Defendants].” Mr. Lippard’s reported income shows \$13,804.00 for 2010, \$31,169 for 2011, \$9,824.00 for 2012, and \$18,008 for 2013, the year following the publication of the majority of the allegedly defamatory statements at issue. Mr. Lippard has failed to show how the allegedly defamatory statements resulted in pecuniary harm. Without more, any connection between Plaintiffs’ income and Defendants’ statements, particularly

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those allegedly defamatory statements which courts are not barred from considering by the First Amendment, is “pure speculation.” *Griffin*, 180 N.C. App. at 138-39, 636 S.E.2d at 305. Plaintiffs have failed to show special damages so as to warrant denial of Defendant’s motion for summary judgment on the libel and slander *per quod* claims.

**III. Conclusion**

In the case of defamation claims, I would hold that courts must evaluate the specific elements of the claim, including the falsity of the alleged statement, and determine whether “resolution of [the truth or falsity of the alleged statement] requires the court to interpret or weigh church doctrine. If not, the First Amendment is not implicated and neutral principles of law are properly applied to adjudicate the claim.” *Smith*, 128 N.C. App. at 494, 495 S.E.2d at 398. Based on this analysis, I concur with the majority’s holding for some of Plaintiffs’ claims that they are barred because resolving the claims requires courts to interpret or weigh church doctrine.

For the four allegedly defamatory statements discussed above—Mr. Hix’s oral allegation that Mr. Lippard is a liar and written allegation that Plaintiffs denied “verifiable facts,” along with Mr. Holleman’s statements that “strategies” were playing out against church leadership and that Mr. Lippard allegedly committed a crime—I disagree and would hold that there is no need for the court to interpret or weigh church doctrine in its adjudication of the truth or falsity of these claims.

[The majority’s] contrary holding—that a religious body must be held free from any responsibility for [allegedly defamatory statements,] although such [statements] incorporate no theological or dogmatic tenets—[go[es] beyond First Amendment protection and cloak[s] such bodies with an exclusive immunity greater than that required for the preservation of the principles constitutionally safeguarded.

*Smith*, 128 N.C. App. at 495, 495 S.E.2d at 398 (citation omitted). Therefore, I dissent in part. For these claims that I would hold are not barred by the ecclesiastical entanglement doctrine, I would nevertheless hold that Plaintiffs have not shown sufficient evidence for libel *per se* or special damages as required for libel or slander *per quod*. Therefore, I concur in the majority’s judgment affirming the trial court’s grant of summary judgment for Defendants.

**POOVEY v. VISTA N. CAROLINA LTD. P'SHIP**

[271 N.C. App. 453 (2020)]

CHAD POOVEY AND ANGELA POOVEY, PLAINTIFFS

v.

VISTA NORTH CAROLINA LIMITED PARTNERSHIP AND  
APC TOWERS, LLC, DEFENDANTS

v.

130 OF CHATHAM, LLC, ET AL., NOMINAL DEFENDANTS

No. COA19-302

Filed 19 May 2020

**Real Property—housing subdivision—amendment to declaration  
by developer—reasonableness determination**

In a declaratory judgment action brought by subdivision lot owners challenging defendant-developer's decision to allow a cell phone tower to be erected on an adjacent lot, the trial court properly granted summary judgment for defendant. The subdivision's declaration of covenants and restrictions granted defendant authority to make amendments, and its amendment allowing the placement of one cell tower in order to improve wireless communication services for the residents was reasonable under the standard set forth in *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547 (2006), given the nature and character of the community and other objective circumstances.

Appeal by plaintiffs from order entered 26 January 2018 by Judge J. Thomas Davis in Superior Court, Rutherford County. Heard in the Court of Appeals 2 October 2019.

*Cannon Law, P.C., by William E. Cannon, Jr., Mark A. Wilson, and Tiffany F. Yates, for plaintiffs-appellants.*

*Hamilton Stephens Steele + Martin, PLLC, by M. Aaron Lay and Daniel J. Finegan, for defendant-appellee Vista North Carolina Limited Partnership.*

*Nesxen Pruet, PLLC, by David S. Pokela and Alex R. Williams, for defendant-appellee APC Towers, LLC.*

STROUD, Judge.

Plaintiffs appeal from an order granting summary judgment in favor of Defendants and denying their motion for summary judgment. Because Defendant Vista had the authority to amend the declaration and



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the amendment is reasonable, the trial court did not err in granting summary judgment in favor of Defendants and denying Plaintiffs' motion for summary judgment.

**I. Background**

In 2010, Plaintiffs became the owners of a lot in the Riverbend Highlands subdivision in Rutherford County. Defendant Vista North Carolina Limited Partnership ("Vista") is the developer of Riverbend Highlands Subdivision, a residential subdivision with 573 lots. Defendant Vista is also the declarant of the covenants and restrictions for the subdivision. Riverbend Highlands is in a heavily wooded mountainous area, and most of the 573 lots are vacant, including Plaintiffs' lot.

Riverbend Highlands ("Subdivision") is governed by the "Amended and Restated Declaration of Covenants and Restrictions as of July 16<sup>th</sup> 2007" ("2007 Declaration").<sup>1</sup> These restrictions state in relevant part:

Section 4.1. Residential. Each of the Lots in the Community shall be, and the same hereby are, restricted exclusively to single-family residential use and shall be occupied only by a single family, its nurses, aides, servants, or caretakes, and guests.

....

Section 4.3. Business Activities. No business activities shall be conducted on any portion of this Planned Community, not any Lot nor any Residence, provided, however; private offices may be maintained in residences constructed on Lots so long as such use is incidental the primary residential use of the Lot and is approved by the Board of Directors.

....

Section 5.1 Utility Easements. Developer hereby reserves the right without further consent from any land owner to grant to any public utility company, municipality, the Association or other governmental unit, water or sewer company an easement for a right-of-way in all streets and

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1. Defendant Vista's predecessor in interest established the subdivision with the Original Declaration, filed in 1975. The Original Declaration was replaced by the Amended and Restated Declaration recorded by Defendant Vista in 2007.



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roads on which the land hereby conveyed abuts and also in and to a 10 foot strip of land located along the front lot line, and a 5 foot strip of land located along any other lot line, for the right to erect and lay, or cause to be erected or laid, maintained, removed or repaired, all light, telephone and telegraph poles, wires, water and gas pipes and conduits catch basins, surface drains, sewage lines, access easement and other customary or usual appurtenances as may, from time to time, in the opinion of the Developer, or any utility company, or governmental authority, be deemed necessary for maintenance and repair of said utilities or other appurtenances. Any right of recourse on account of temporary or other inconvenience caused thereby against Developer is hereby waived by the Buyer.

. . . .

Section 10.4. Amendments. Any of the provisions of this Declaration may be annulled, amended or modified as to all or part of the lots subject to these restrictions at any time by the filing in the Office of the Register of Deeds of Rutherford County of any instrument setting forth, such annulment, amendment or modification, executed by either the Developer, or assigns at any time during which it owns of record a lot in Riverbend Highlands Subdivision or adjacent properties which it has or intends to subdivide or the Owners of record (as shown upon the records in the Office of the Register of Deeds for Rutherford County at the time of filing of such instrument) of sixty-seven percent (67%) of the Lots subject to these restrictions. Should a dispute arise between an amendment made by the owners of record of sixty-seven (67%) of the Lots subject to the restrictions versus an amendment made by the Developer, the Developer's amendment shall prevail. The procedure for amendment shall follow the procedure set forth in Section 47F-2-117 of the Planned Community Act. No amendment shall become effective until recorded in the office of the Register of Deeds of Rutherford County, North Carolina.

In 2015, Defendant Vista was approached by Defendant APC Towers, LLC, (collectively "Defendants") about installing a wireless communications tower ("Tower") within Riverbend Highlands. In November 2015, Defendant Vista entered into a lease with Defendant APC Towers to

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permit the construction and operation of the Tower on a lot owned by Defendant Vista. In March 2016, Defendant Vista recorded an amendment to the 2007 Declaration ("March 2016 Amendment") which deleted Section 5.1 of the 2007 Declaration and replaced it with this provision:

Section 5.1. Utility and Communications Facility Easements and Leaseholds. Developer hereby reserves the right without further consent from any Owner to grant to any public utility company, municipality, private entity, the Association and any governmental unit, water or sewer company an easement for a right-of way in all streets and roads on which the land hereby conveyed abuts, in and to a 10 foot strip of land located along the front lot line, a 5 foot strip of land located along any other lot line, or an easement or leasehold interest in all or any portion of a lot, for the right to erect and lay, or cause to be erected or laid, maintained, removed or repaired, all light, telephone and telegraph poles, wireless communications tower(s), wires, water and gas pipes and conduits catch basins, surface drains, sewage lines, access easement and other customary or usual appurtenances as may, from time to time, in the opinion of the Developer, or the applicable grantee or lessee, as be deemed necessary by such party for maintenance and repair of said utilities or other appurtenances hereinabove delineated. Any right of recourse on account of temporary or to her inconvenience caused thereby against Developer is hereby waived by each Owner. Notwithstanding anything contained in this Declaration, the restrictions contained in Article 4 or otherwise in this Declaration shall not apply to any Lot whereon Declarant grants an easement or leasehold interest pursuant to this Section 5.1, with respect to the grantee's or lessee's use of and construction at such Lot.

In April 2016, Defendant Vista sent a letter to Plaintiffs and offered to exchange their lot for one in another nearby development, either Riverbend Highlands or Riverbend at Lake Lure. Other affected owners successfully exchanged lots with Defendant Vista, but Plaintiffs declined to do so. Work began on the Tower on 11 May 2016. Plaintiffs' counsel sent Defendant Vista a letter dated 11 May 2016 informing Defendant Vista that the covenants restrict use of the lots to "single family residential use." The letter states, "Should you attempt to violate

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these covenants by erecting a cell tower on a platted lot, my client will have no choice but to seek injunctive relief prohibiting the construction and seek reimbursement of their reasonable attorney's fees pursuant to the Planned Community Act." Plaintiffs sent a letter to Defendant APC Towers on 24 May 2016 informing it of their intent to sue. Plaintiffs filed a complaint asking the trial court for a declaratory judgment and injunctive relief on 1 June 2016.<sup>2</sup>

The Tower was completed in July 2016. The dimensions of the Tower are approximately thirty-three feet six inches in diameter at the base. The tower pole is ten feet in diameter and has a height of 195 feet. It is on a lot adjacent to Plaintiffs' lot. The president of Vista North Carolina, Inc., the general partner in Defendant Vista, stated in his affidavit that "[t]he tower was constructed for AT&T to provide high-speed mobile broadband internet, phone, and related telecommunications services."

On 11 August 2016, Defendant Vista filed a motion to dismiss, answer, and affirmative defenses. On 12 August 2016, Defendants filed a joint motion for judgment on the pleadings. Their motion noted the various provisions of the 2007 Declaration and the March 2016 Amendment quoted herein and that Defendant Vista was the developer of the subdivision and still owned a majority of the 573 lots in the subdivision. Thus, Defendant Vista contended that as the "developer" it had essentially unlimited authority to amend the 2007 Declaration because the subdivision was still within the developer control period. Defendants alleged that wireless telecommunications are a public utility, and Section 5.1 of the 2007 Declaration provided for provision of public utility services. Defendant Vista alleged the March 2016 Amendment was filed to clarify "that Section 5.1 contemplated the installation of telecommunication utility facilities, including technologies such as wireless communications, which did not exist at the time that the first declaration was written for Riverbend Highlands." Defendants further alleged that the construction of the Tower did not change the residential nature of the community, is not an operating business, and does not generate noise or traffic: "It is simply an unmanned utility tower that transmits wireless signals and data for cellular telephones and other mobile devices." Defendants alleged federal law embodies and promotes the public

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2. Plaintiffs' complaint also named approximately 150 nominal defendants, including all record owners of all lots in Riverbend Highlands. One of the nominal defendants appeared in this action before the trial court but none appealed or appeared before this Court.

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policy of providing wireless telecommunication services.<sup>3</sup> Defendants argued that Plaintiffs' claims were based only upon the aesthetics of the Tower.<sup>4</sup>

All parties moved for judgment on the pleadings. After a hearing, the trial court entered an order on 18 October 2016 granting in part judgment on the pleadings in favor of Plaintiffs and declaring the March 2016 Amendment to be unreasonable as a matter of law because under the language of the March 2016 Amendment, the developer had "carte blanc [sic] ability to remove the very essence and nature of the Subdivision from any lot, and to substantially interfere with the Landowner's actual residential use of a lot." The trial court noted that under the March 2016 Amendment, a "Developer could grant a utility lease over landowner's house." But the trial court denied judgment on the pleadings as to whether the "construction of a wireless communication tower on a lot is in violation of the valid Declarations" under *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 633 S.E.2d 78 (2006). The trial court stated it did "not have sufficient information from the pleadings to address the nature and character of the community as well as the nature and character of the construction generating the complaint." The court denied the remaining relief sought by both parties.

The parties then conducted discovery. In November 2016, Defendant Vista recorded a second amendment to the 2007 Declaration ("November 2016 Amendment") which nullified and struck the March 2016 Amendment which the trial court had determined was unreasonable as a matter of law in its October 2016 order. The November 2016 Amendment replaced Section 5.1 of the 2007 Declaration with the following:

Section 5.1. Utility and Communications Facility Easements and Leaseholds. Developer hereby reserves the right without further consent from any Owner to grant to any public utility company, municipality, private entity,

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3. Although North Carolina General Statute § 160A-400.50 applies only to municipalities, Defendant APC Towers notes the public policy to provide wireless telecommunications service throughout the State to ensure "reliable wireless service to the public, government agencies, and first responders, with the intention of furthering the public safety and general welfare." See N.C. Gen. Stat. § 160A-400.50(a) (2017).

4. Defendants summarized Plaintiffs' lawsuit as a "NIMBY" claim. "NIMBY" is an acronym for "not in my backyard," and it is defined as "opposition to the locating of something considered undesirable (such as a prison or incinerator) in one's neighborhood." Merriam-Webster, <https://www.merriam-webster.com/dictionary/NIMBY> (last visited Apr. 6, 2020).

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the Association and any governmental unit, water or sewer company an easement for a right-of-way in all streets and roads on which the land hereby conveyed abuts, in and to a 10 foot strip of land located along the front lot line, a 5 foot strip of land located along any other lot line for the right to erect and lay, or cause to be erected or laid, maintained, removed or repaired, all light, telephone and sewage lines, access easement and other customary or usual appurtenances as may, from time to time, in the opinion of the Developer, or the applicable grantee or lessee, as be deemed necessary by such party for maintenance and repair of said utilities or other appurtenances hereinabove delineated. The Developer may grant an easement or leasehold interest in all or any portion of one Developer owned Lot for the placement and construction of one wireless communications tower in order to improve wireless communications services to Riverbend Highlands. Any right of recourse on account of temporary or other inconvenience caused thereby against Developer is hereby waived by each Owner. Notwithstanding anything contained in this Declaration, the residential construction of a single monopole wireless communications tower on said Lot and the operation thereof and the construction and operation of such shall not be considered a nuisance under this Declaration or otherwise a violation of this Declaration.

On 5 October 2017, Plaintiffs filed a motion for summary judgment. With the motion, Plaintiffs submitted the Rule 30(b)(6) depositions of Defendants and the affidavits of Fred Epeley<sup>5</sup> and Plaintiff Angela Poovey. On 8 January 2018, Defendant APC filed a motion for summary judgment, noting its intent to rely upon the pleadings, affidavits, depositions, and other documents produced in discovery, and attached the affidavit of David Pierce, the Senior Vice President of Operations for APC Towers. On 2 February 2018, Defendant Vista also filed a motion for summary judgment.

After a hearing on the summary judgment motions, the trial court denied Plaintiffs' motion for summary judgment and granted Defendants' motion for summary judgment. After a cross-claim by a nominal defendant was dismissed, Plaintiffs timely appealed.

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5. Fred Epeley appears to be a nominal defendant, and his affidavit included photographs of the completed cell tower.

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## II. Standard of Review

The standard of review for a summary judgment motion is well established:

Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that “there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” “When considering a motion for summary judgment, the trial judge must view the presented evidence in a light most favorable to the non-moving party.” If the movant demonstrates the absence of a genuine issue of material fact, the burden shifts to the nonmovant to present specific facts which establish the presence of a genuine factual dispute for trial. Nevertheless, “[i]f there is any question as to the weight of evidence summary judgment should be denied.”

*In re Will of Jones*, 362 N.C. 569, 573-74, 669 S.E.2d 572, 576 (2008) (alteration in original) (citations omitted).

None of the parties contend there is any genuine issue of material fact and all argued before the trial court, and on appeal, that summary judgment was appropriate as a matter of law. The parties submitted affidavits, depositions, and discovery materials to support their motions, providing detailed information regarding the subdivision, the Declarations and amendments, the dimensions and characteristics of the Tower, the location of the Tower, and views of the Tower from various points in the subdivision. But the material facts regarding the nature and character of the subdivision and the Tower are not disputed. Plaintiffs’ evidence regarding the facts addresses primarily their opinion that the Tower obstructs the view from their lot and would interfere with their plans to construct a home on the lot. For purposes of review of the ruling on summary judgment, we take Plaintiffs’ evidence as true and assume that the Tower does obstruct the view from their lot. Defendants’ evidence regarding the facts does not conflict with Plaintiffs’ evidence; it addresses different facts, such as the character of the subdivision, topography, and information regarding the location and need for the Tower. Plaintiffs’ legal arguments address primarily their contention that the Tower is a commercial or business activity and that the November 2016 Amendment is unreasonable because it is inconsistent with the character of the subdivision as a residential community.

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## III. Reasonableness of Amended Restrictive Covenants

Plaintiffs argue “[t]he cell tower location is not consistent with residential lot use nor the utility easement size limitations required by the 2007 Declarations.” But Defendant Vista amended the 2007 Declaration, and Plaintiffs do not challenge the procedure by which the amendment was adopted, so the relevant question is whether the Tower’s location is consistent with the November 2016 Amendment to the Declaration. Placement of the Tower was authorized by the November 2016 Amendment. In the 2007 Declaration, Defendant Vista reserved the authority to amend “[a]ny of the provisions” of the Declaration “at any time” it still owned a subdivision lot, and there is no dispute that Defendant Vista owned many lots. To rebut the presumption of validity of the November 2016 Amendment, Plaintiffs contend the November 2016 Amendment is unreasonable based on *Armstrong v. Ledges Homeowners Ass’n*, 360 N.C. 547, 633 S.E.2d 78.

In *Armstrong*, our Supreme Court considered “to what extent the homeowners’ association may amend a declaration of restrictive covenants.” *Id.* at 548, 633 S.E.2d at 81 (emphasis omitted). The Supreme Court held that “a provision authorizing a homeowners’ association to amend a declaration of covenants does not permit amendments of unlimited scope; rather, every amendment must be *reasonable* in light of the contracting parties’ original intent.” *Id.* at 559, 633 S.E.2d at 87 (footnote omitted). A court should consider various factors to determine if an amendment is reasonable, including “the language of the declaration, deeds, and plats, together with other objective circumstances surrounding the parties’ bargain, including the nature and character of the community.” *Id.* at 548, 633 S.E.2d at 81.

In *Armstrong*, the neighborhood consisted of “forty-nine private lots set out along two main roads and four *cul de sacs*.” *Id.* at 560, 633 S.E.2d at 88. There were no common areas or amenities. *Id.* The Supreme Court noted that “[g]iven the nature of this community, it makes sense that the Declaration itself did not contain any affirmative covenants authorizing assessments. Neither the Declaration nor the plat shows any source of common expense.” *Id.* The only shared obligation in the covenants was payment of the utility bill for a lighted sign at the entrance. *Id.* (“Each lot owner’s pro rata share of this expense totals approximately seven dollars and twenty cents per year.”).

Over the years, the Association began charging lot owners for additional assessments up to about \$80 to \$100 per year to cover the costs of “mowing the roadside on individual private lots . . . for snow removal



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from subdivision roads, and for operating and legal expenses.” *Id.* at 551, 633 S.E.2d at 82-83. After the petitioners raised an objection to the increasing demands for payment of various assessments by the lot owners, the Association adopted amendments to the bylaws. *Id.* at 552, 633 S.E.2d at 883. The amended bylaws were “substantially different” from the “originally recorded Declaration” and included several entirely new obligations imposed upon lot owners,

including a clause requiring Association membership, a clause restricting rentals to terms of six months or greater, and clauses conferring powers and duties on the Association which correspond to the powers and duties previously adopted in the Association’s amended by-laws.

Additionally, the Amended Declaration imposes new affirmative obligations on lot owners. It contains provisions authorizing the assessment of fees and the entry of a lien against any property whose owner has failed to pay assessed fees for a period of ninety days. According to the Amended Declaration, such fees are to be “assessed for common expenses” and “shall be used for the general purposes of promoting the safety, welfare, recreation, health, common benefit, and enjoyment of the residents of Lots in The Ledges as may be more specifically authorized from time to time by the Board.” Special assessments may be made if the annual fee is inadequate in any year; however, surplus funds are to be retained by the Association. Unpaid assessments bear twelve percent interest per annum.

*Id.* at 552-53, 633 S.E.2d 78, 83-84.

The Supreme Court held the amendment was unreasonable because it gave the Association “practically unlimited power” to assess lots and was “contrary to the original intent of the contracting parties.” *Id.* at 561, 633 S.E.2d at 88. The Supreme Court also considered the nature and character of the community, since the original declarations did not provide for any common areas or amenities which might require increasing assessments. *Id.*

In *Southeastern Jurisdictional Administrative Council, Inc. v. Emerson*, our Supreme Court addressed a community with a very different nature and character than in *Armstrong* and held an amendment which imposed an annual “*SERVICE CHARGE* in an amount fixed by the SEJ Administrative Council for police protection, street



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maintenance, street lighting, drainage maintenance, administrative costs and upkeep of the common areas” to be reasonable after considering the factors noted in *Armstrong*. 363 N.C. 590, 599-600, 683 S.E.2d 366, 372 (2009) [hereinafter *SJAC*]. In highlighting the differences between the two cases, the Court noted the importance of “the nature and character of the community” and “the legitimate expectations of [the] lot owners:”

In considering “the legitimate expectations of [the] lot owners” in *Armstrong*, this Court emphasized that, at the time the plaintiff property owners purchased their lots, the community contained “no common areas or amenities,” and that “[n]either the Declaration nor the plat shows any source of common expense.” The plaintiffs in *Armstrong* professed a specific desire to live in a community lacking amenities for which they did not wish to pay, and they believed at the time of purchase that The Ledges was such a community. This Court agreed that the plaintiffs “purchased their lots without notice that they would be subjected to additional restrictions on use of the lots and responsible for additional affirmative monetary obligations imposed by a homeowners’ association” and therefore, concluded that it would be unreasonable to enforce the amended covenants against them and require them to pay the disputed fees.

The Assembly stands in stark contrast to the community at issue in *Armstrong*. Whereas The Ledges community had only existed for about fifteen years when that controversy arose and was a fairly typical subdivision, the Assembly has existed for nearly a century and has spent that entire time purposefully developing its unique, religious community character. To that end, the Council and its predecessors have subjected the Assembly’s residential lots to a wide variety of detailed restrictions, and they have done so consistently since the first lots were sold. Since the Assembly’s establishment, all deeds conveying land within the community have included covenants requiring compliance with the bylaws, rules, and regulations periodically adopted by the Council.

*Id.* at 597-98, 683 S.E.2d at 370-71 (2009) (alterations in original) (citations omitted).

Defendant Vista argues that *Armstrong* does not apply to this case because “there is no mandate from the Supreme Court that applies the

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'reasonableness' standard to amendments made by a developer within the developer's control period of a subdivision." But our Supreme Court has made no distinction in its analysis of the reasonableness of amendments based upon whether the amendment was made by a developer or a homeowners association. *See generally Armstrong*, 360 N.C. 547, 633 S.E.2d 78. For example, *SJAC* involved a unique situation, as the new assessments were imposed by neither a traditional homeowners association nor a traditional developer but by the

Southeastern Jurisdictional Administrative Council, Inc. ("the Council") is a nonprofit, non-stock corporation that manages, owns, develops, and sells land in Haywood County known as the Lake Junaluska Assembly Development. In addition, the Council maintains and operates the Assembly by providing such services as street lighting, fire and police protection, and maintenance of roads and common areas. The Council is the successor in interest to the Lake Junaluska Assembly; the Lake Junaluska Methodist Assembly; and ultimately the Southern Assembly of the Methodist Church, which was the Assembly's earliest incarnation. The Council operates the Assembly under the auspices of the Southeastern Jurisdictional Conference of the United Methodist Church in the United States of America.

363 N.C. at 591, 683 S.E.2d at 367. Thus, the requirement of reasonableness applies to an amendment adopted by a developer as well as by a homeowners association. *See id.*

In addition, Defendant Vista argues that a later statutory amendment provides that an amendment properly adopted is presumed reasonable. In 2013, the Planned Community Act was amended to add this provision: "Any amendment passed pursuant to the provisions of this section or the procedures provided for in the declaration are presumed valid and enforceable." N.C. Gen. Stat. § 47F-2-117(d) (2017). Defendant Vista argues that since the "[November 2016 Amendment] was adopted and recorded in compliance with the procedures set forth in Section 10.4 of the Declaration, it is accordingly entitled to this presumption of validity and enforceability."

Plaintiffs respond that North Carolina General Statute § 47F-2-117(d) addresses only the procedure for amending declarations and not "substantive challenges to amendments." We agree that North Carolina General Statute § 47F-2-117(d) does not eliminate the reasonableness

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requirement as set out in *Armstrong*. In *Kimler v. Crossings at Sugar Hill Property Owner's Ass'n*, this Court addressed the application of North Carolina General Statute § 47F-2-117 to the authority of a homeowner's association to amend a declaration but then also considered the reasonableness of the amendment. 248 N.C. App. 518, 789 S.E.2d 507 (2016). After holding the amendment in question to be valid and enforceable, this Court noted:

Sugar Hill HOA's authority to amend the Declaration is not unlimited. Rather, our Supreme Court has held that an owners' association's authority to amend a declaration is limited to those amendments which are "reasonable [.]". "Reasonableness may be ascertained from the language of the declaration, deeds, and plats, together with the other objective circumstances surrounding the parties' bargain, including the nature and character of the community."

*Id.* at 524, 789 S.E.2d at 511 (citation omitted) (quoting *Armstrong*, 360 N.C. at 548, 633 S.E.2d at 81).

Plaintiffs argue, based on *Armstrong*, the construction of the Tower was not reasonable "in light of the contract parties' original intent" based on the 2007 Declaration. Plaintiffs further argue "the intent of a residential use only community is evident in the interdependence of the restriction on non-residential use and the requirement of narrow utility easements. Examining the nature of the community prior to the [November] 2016 Amendment supports a finding of an unreasonable amendment." Plaintiffs note the 2007 Declaration provides for fifteen or ten-foot wide utility easements along the lot lines, and the only utility structures in the subdivision before construction of the Tower were "small utility poles approximately twelve to fifteen inches in diameter and approximately twenty-five to thirty feet tall." These poles were "sparsely distributed within the subdivision[] . . . to provide telephone and electrical service to houses . . . and do not substantially interfere with a lot owners use of their lot or view from their lot." Plaintiffs characterize the Tower as a business or commercial use of the lot and argue that the character of the neighborhood is residential, as the Declarations prohibit "business activities" in the community.

It is true that most utility companies are businesses, and they conduct commercial activities; they sell products and services for a profit. But their business *is* the provision of utility services, including utilities serving residential customers. The unmanned tower is not a production facility or store location; it is more comparable to a power line or sewer

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pipe. Plaintiffs are correct that the subdivision is limited to residential use; Defendants agree but argue that the Tower “is a utility installation for the benefit of the Riverbend Highland development, not a commercial endeavor.”

The 2007 Declaration provided for utility easements for

light, telephone and telegraph poles, wires, water and gas pipes and conduits, catch basins, surface drains, sewage lines, access easement and other customary or usual appurtenances as may, from time to time, in the opinion of the Developer, or any utility company, or governmental entity, be deemed necessary for maintenance and repair of said utilities or other appurtenances.

Plaintiffs focus on the limitation of fifteen and ten-foot wide strips of land reserved for utilities in the 2007 Declaration, as opposed to a larger area as required for a cellular tower. But the only substantive change the November 2016 Amendment made to the 2007 Declaration as to utility easements was to allow *one* of the 573 lots in the community to be devoted to a cellular tower. The November 2016 Amendment eliminated the problem noted by the trial court in the March 2016 Amendment, which would have given Defendant Vista “carte blanc [sic] ability to remove the very essence and nature of the Subdivision from any lot” since that amendment did not limit the number of lots which could be used for this purpose. The November 2016 Amendment allows a cellular tower on only one lot of the 573 lots.

Narrow strips of land sufficed for nearly all utilities in residential subdivisions in the past—such as the telephone and telegraph poles referred to in the 2007 Declaration—but larger installations are sometimes needed for portions of utilities.<sup>6</sup> Based upon the 2007 Declarations, the original plan for the community provided for availability of modern utilities for the residences, including electricity, gas, telecommunications, water, sewer, and “other customary or usual appurtenances as may, from time to time, . . . be deemed necessary for maintenance and repair” of these services. Cellular phone service is a telecommunications service, and even if it was less common in 2007, it is now well-established that cellular phone service is a “public utility,” and cellular phone service provides the same service to the residences

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6. Some of the electrical structures within the subdivision are larger than the roadside poles noted by Plaintiffs, but the evidence does not address whether those structures are located fully within the narrow roadside easements. For purposes of summary judgment review, we will assume they are.

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in the community as the telephone and telegraph service by wires has traditionally provided.<sup>7</sup> See *Bellsouth Carolinas PCS, L.P. v. Henderson Cty. Zoning Bd. Of Adjustment*, 174 N.C. App. 574, 579, 621 S.E.2d 270, 274 (2005) (“[W]e hold that a cellular telephone company is a ‘public utility.’ In addition, a cellular telephone tower which provides cellular telephone service is a ‘public utility station’ under Section 603.01 of the Henderson County Zoning Ordinance. The Board erred as a matter of law in holding BellSouth was not a public utility and by concluding that the cellular tower was not a ‘public utility station.’ ”).

Defendant Vista presented uncontroverted evidence that a cellular tower was needed in the subdivision to “alleviate the lack of access to highspeed mobile communications services to [the subdivision] and surrounding areas under a federal initiative to bring higher speed and accessible communications to more rural areas.” Defendant Vista considered wireless broadband telephone and internet services to be “a necessary utility for today’s real estate market and the demand of its lot owners and potential buyers.” In addition, if Defendant Vista had not agreed for the Tower to be placed within the subdivision, a similar tower would have been placed on adjoining land but Defendant Vista would have had no control over “the type of tower, location, visibility, or other aesthetic factors, including obstruction of views from lots in Riverbend Highlands.” To select the lot for the Tower, Defendant Vista “worked with APC Towers to locate the Tower on a lot that provided a balance of coverage and limited any perceived line of sight impacts for owners and would not require the granting of an access easement or other easement over lots not owned by [Vista].”

The subdivision is in a mountainous area and had areas with poor cell phone reception. The 2007 Declarations provided for utility services, including telecommunications, for the residents of the subdivision. Defendants determined there was need for an additional cellular tower in this vicinity. There were other potential locations for a tower, including on land adjoining the subdivision, although the tower would still have been visible from some lots in the subdivision. Indeed, a tower outside the subdivision could have still physically adjoined a lot or lots within the subdivision. Defendants considered both the technical needs for the location of the Tower as well as the need to avoid blocking views of subdivision residents and determined that a lot within the subdivision would best address both concerns. In the terminology of both the

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7. The means of providing a particular utility may change over time, as revealed by the Declarations reference to “telegraph poles.”

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November 2016 Declaration and the 2007 Declaration, a cellular tower is a “customary or usual appurtenance” which Defendant Vista “deemed necessary for maintenance” of telephone services in the community. Plaintiffs’ affidavits and evidence do not refute any of this evidence regarding the need for a cellular tower to provide reliable phone service in the area or the technical requirements for its location. Instead, Plaintiffs object because the Tower is on the lot adjoining theirs and it interferes with their “previously unobstructed view.” Certainly, the view is an important consideration, particularly in a community in a mountainous area. But even if we take the allegations of Plaintiffs’ affidavits as true, the 2007 Declaration does not promise all lots an “unobstructed view;” but it does provide for utility service, including telephone service, to all residents and it provides for changes as needed “from time to time” to maintain and repair the utility services.

After considering the “the language of the declaration, deeds, and plats, together with other objective circumstances surrounding the parties’ bargain, including the nature and character of the community,” *Armstrong*, 360 N.C. at 548, 633 S.E.2d at 81, the November 2016 Amendment was reasonable. Thus, the trial court correctly granted Defendants’ motions for summary judgment, denied Plaintiffs’ motion for summary judgment, and dismissed Plaintiffs’ claims.

**IV. Conclusion**

Defendant Vista had the authority to amend the declaration. Because the November 2016 Amendment was reasonable, the trial court did not err in granting summary judgment in favor of Defendants and denying Plaintiffs’ motion for summary judgment.

**AFFIRMED.**

Judges DILLON and YOUNG concur.

**STATE v. GALLOWAY**

[271 N.C. App. 469 (2020)]

STATE OF NORTH CAROLINA

v.

TYLER JOSEPH GALLOWAY

No. COA19-610

Filed 19 May 2020

**Appeal and Error—probation revocation—sentencing—pre-trial  
confinement credit—claim for additional credit**

The trial court's determination of the pre-trial confinement credit due defendant after revocation of his probation and activation of his sentence was not reviewable on appeal where defendant had not initially brought his claim for additional jail credit in the trial court pursuant to N.C.G.S. § 15-196.4. The Court of Appeals denied defendant's petition for writ of certiorari and dismissed the appeal without prejudice for defendant to first seek relief in the trial court.

Appeal by defendant from judgments entered 17 and 18 December 2018 by Judge William H. Coward in Henderson County Superior Court. Heard in the Court of Appeals 19 February 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Jessica Helms, for the State.*

*Guy J. Loranger for defendant.*

DIETZ, Judge.

After Defendant Tyler Joseph Galloway pleaded guilty to multiple offenses, the trial court suspended his three consecutive sentences and placed him on supervised probation. Later, at a probation violation hearing, the trial court revoked Galloway's probation, reactivated his sentences, and awarded him 343 days of jail credit. Galloway appeals the judgments revoking his probation, asking this Court to remand the case to the trial court to determine whether he should have received an additional 107 days of credit.

Under precedent from this Court, Galloway's argument is not suited for appellate review at this time. *State v. Cloer*, 197 N.C. App. 716, 721, 678 S.E.2d 399, 403 (2009). Accordingly, we dismiss Galloway's appeal without prejudice so that he may, if he chooses, seek relief from the trial court pursuant to N.C. Gen. Stat. § 15-196.4 and then, if necessary,

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appeal the trial court's determination with a record suitable for meaningful review in this Court.

**Facts and Procedural History**

On 18 May 2015, Defendant Tyler Joseph Galloway pleaded guilty to three counts of possession of a firearm by a felon, one count of felony larceny, and one count of obtaining property by false pretenses. After consolidating three of the charges, the trial court entered three judgements sentencing Galloway to three consecutive prison terms of 14 to 26 months each. The court suspended these sentences and placed Galloway on supervised probation for 36 months.

On 18 December 2018, the trial court held a probation violation hearing based on violation reports filed earlier that year. Galloway admitted to the trial court that he willfully violated his probation. Before the court revoked Galloway's probation, defense counsel requested that the court grant Galloway 450 days of jail credit. Earlier that day, defense counsel had also filed a "Certification of Defendant's Pretrial Confinement Credit," asserting that Galloway was entitled to 450 days of credit. However, upon revoking Galloway's probation and reactivating his three sentences, the court applied 343 days of pretrial confinement credit to the first sentence. The record on appeal does not indicate how the trial court arrived at its 343-day credit determination or the basis for rejecting the larger credit asserted by Galloway. Galloway appealed the trial court judgments and also petitioned for a writ of certiorari.

**Analysis**

Galloway's sole argument on appeal concerns the discrepancy between the 450 days of jail credit he requested and the 343 days of credit the trial court awarded. He contends that the record fails to explain how either his counsel or the trial court calculated the days of credit to which he was entitled. Thus, Galloway asks this Court to vacate the trial court's judgments and remand his case for resentencing "and a determination of the appropriate amount of pretrial confinement credit which he is due." In the alternative, he asks that we dismiss his appeal without prejudice so he may raise the issue in a motion to the trial court for additional credit. We agree that Galloway's alternative request is the proper remedy here.

As a preliminary matter, Galloway acknowledges that the General Statutes do not expressly provide a right of appeal on this jail credit issue. N.C. Gen. Stat. § 15A-1444(a1)–(a2). Thus, in addition to his written notice of appeal, he petitioned for a writ of certiorari. *See id.* § 15A-1444(e); *but see State v. Farris*, 111 N.C. App. 254, 255, 431 S.E.2d



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803, 804 (1993) (hearing defendant's argument regarding jail credit on direct appeal even though the defendant pleaded guilty). Ultimately, as explained below, we deny certiorari and dismiss Galloway's appeal because, under our precedent, direct appeal is not the appropriate vehicle to raise this issue and seek judicial review.

Upon revoking probation and reactivating a criminal sentence, the trial court must credit the sentence by the total amount of time the defendant spent in pretrial confinement for the underlying charge. N.C. Gen. Stat. § 15-196.1. A defendant seeking to obtain credit "*in addition to that awarded at the time of . . . the revocation of the defendant's probation,*" cannot raise the issue on direct appeal from the initial judgment. *State v. Cloer*, 197 N.C. App. 716, 721, 678 S.E.2d 399, 403 (2009) (emphasis added). Rather, the defendant must "initially present his or her claim for additional credit to the trial court" by filing a request in that court for "credit not previously allowed" pursuant to N.C. Gen. Stat. § 15-196.4. *Id.* Then, the defendant may appeal the trial court's decision to this Court.<sup>1</sup> *Id.*

Here, the relief Galloway seeks is the ability to return to the trial court to litigate whether his "counsel was correct" and he "was entitled to 450 days of credit . . . or 343 days of credit." He acknowledges that the record is insufficient for this Court to resolve the issue now and seeks only to build a record concerning the amount of jail credit to which he is entitled.

As this Court explained in *Cloer*, the appropriate procedure to address this issue is to first seek relief in the trial court under N.C. Gen. Stat. § 15-196.4. This ensures that the defendant has an opportunity to build a record that will afford meaningful appellate review of the issue. Accordingly, we dismiss Galloway's appeal but we do so *without prejudice* so that Galloway may, if he chooses, seek relief in the trial court and then, if necessary, return to this Court with an appropriate record. *Id.* at 722, 678 S.E.2d at 403–04.

**Conclusion**

We dismiss this appeal without prejudice.

DISMISSED WITHOUT PREJUDICE.

Judges MURPHY and COLLINS concur.

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1. *Cloer* left some ambiguity as to whether the trial court decision should be appealed through a notice of appeal or through a petition for a writ of certiorari, so it is prudent for defendants to do both. *Cloer*, 197 N.C. App. at 722, 678 S.E.2d at 403 n.2.

**STATE v. GANTT**

[271 N.C. App. 472 (2020)]

STATE OF NORTH CAROLINA

v.

DAVID JOHN GANTT, DEFENDANT

No. COA19-995

Filed 19 May 2020

**1. Appeal and Error—revocation of probation—defective notice of appeal**

Where defendant's pro se written notice of appeal from a judgment revoking his probation violated Appellate Rule 4 by not designating the judgment from which he was appealing or the court to which he was appealing and had no certificate of service, the Court of Appeals lacked jurisdiction to hear defendant's appeal and the appeal was dismissed.

**2. Appeal and Error—probation revocation—absconding—conviction of new crime—petition for writ of certiorari**

Where defendant's probation was revoked and his sentence activated at a hearing in which defendant admitted he willfully violated the terms and conditions of his probation by absconding and his conviction of a new crime, the Court of Appeals, after dismissing the appeal for lack of jurisdiction, denied defendant's petition for writ of certiorari to review his probation revocation because he failed to demonstrate that the ends of justice would be promoted by allowing the petition and issuing the writ.

Judge COLLINS concurring in part and dissenting in part.

Appeal by defendant from judgments entered 24 June 2019 by Judge Peter B. Knight in Henderson County Superior Court. Heard in the Court of Appeals 15 April 2020.

*Attorney General Joshua H. Stein, by Associate Attorney General Elizabeth B. Jenkins, for the State.*

*Reece & Reece, by Mary McCullers Reece, for defendant-appellant.*

BERGER, Judge.

On January 30, 2018, David John Gantt ("Defendant") was placed on supervised probation for felony breaking or entering and larceny after

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breaking or entering. Defendant's probation was revoked and his suspended sentence was activated on June 24, 2019, after he admitted that he willfully violated the terms and conditions of his probation, including an allegation that he absconded. Defendant appeals from judgments upon revocation of his probation. However, Defendant concedes his notice of appeal was defective. In the exercise of our discretion, we deny his petition for writ of certiorari and dismiss his appeal.

Factual and Procedural Background

On January 30, 2018, Defendant pleaded guilty to felony breaking or entering and felony larceny after breaking or entering. The trial court sentenced Defendant to two consecutive 8- to 19-month prison terms, suspended both sentences, and placed Defendant on supervised probation for 24 months. Probation violations were filed for Defendant's failure to comply with the terms and conditions of his probation on March 12 and July 13, 2018 (the "Violation Reports"). The Violation Reports alleged that Defendant possessed drugs, possessed a firearm, possessed a stolen firearm, missed an office visit, was charged with defrauding a drug screen, was charged with possession of methamphetamine, had an outstanding warrant for possession of a stolen vehicle, and absconded.<sup>1</sup>

On June 24, 2019, the trial court conducted a hearing on the Violation Reports. Defendant admitted that he had willfully violated the terms and conditions of his probation as set forth in the reports, and he also informed the trial court that he had been convicted of a criminal offense. In addition, defense counsel stated to the trial court, "my recommendation is to terminate, . . . [a]nd I believe that's by agreement with probation." Defendant specifically admitted to absconding and conviction of a new criminal offense in 17 CRS 54551.

At the conclusion of the hearing, the trial court announced Defendant's probation was revoked. In the written judgment for File Number 17 CRS 54550, the trial court found Defendant had willfully violated the terms and conditions of his probation by absconding,

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1. The March 12, 2018 Violation Report contains the file number for the breaking or entering charge, 17 CRS 54551. The July 13, 2018 Violation Report contains the file number for the larceny after breaking or entering charge, 17 CRS 54550. During the hearing, the probation officer discussed the initial violations which follow the language in the March 12, 2018 Violation Report for 17 CRS 54551, and he then informed the trial court that there was an "Addendum violation" which alleged absconding. However, there is no addendum in the record.

After discussing the "Addendum violation," the probation officer discussed the alleged violations in the July 13, 2018 Violation Report for 17 CRS 54550.

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missing and office visit, and possession of marijuana and drug paraphernalia. In the written judgment revoking Defendant's probation in 17 CRS 54551, the trial court found Defendant had willfully violated the terms of his probation as set forth in paragraph 1 of the July 13, 2018 Violation Report.

[1] Defendant filed a *pro se* purported written notice of appeal. Defendant argues on appeal that the trial court erred by revoking his probation in 17 CRS 54551 for a violation of which he had no notice or, in the alternative, for a violation that was not revocable. However, Defendant's notice of appeal failed to comply with N.C. R. App. P. 4 in that the notice did not (1) designate the judgment from which he was appealing, (2) designate the court to which he was appealing, and (3) properly certify service. Defendant concedes that he neither designated the judgment or judgments from which he was appealing nor the court to which he was appealing, and he had failed to attach a certificate of service.

The defects in Defendant's notice deprive this Court of jurisdiction over his direct appeal. *State v. Hughes*, 210 N.C. App. 482, 484, 707 S.E.2d 777, 778 (2011); *see also State v. McMillian*, 101 N.C. App. 425, 427, 399 S.E.2d 410, 411 (1991). Therefore, Defendant's appeal is dismissed.

Analysis

[2] The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a)(1) (2019).

"A petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Killette*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 834 S.E.2d 696, 698 (2019) (citation and quotation marks omitted). Petitioner must also demonstrate "that the ends of justice will be . . . promoted." *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924). In addition, the decision of "[w]hether to allow a petition and issue the writ of certiorari is not a matter of right and rests within the discretion

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of this Court.” *State v. Biddix*, 244 N.C. App. 482, 486, 780 S.E.2d 863, 866 (2015) (citation omitted).

Defendant’s probation was revoked and his suspended sentence activated for absconding and possession of drug paraphernalia. These are regular conditions of probation. *See* N.C. Gen. Stat. § 15A-1343(b) (2019); *see also* N.C. Gen. Stat. § 15A-1344(a) (2019) (“The court may only revoke probation for a violation of a condition of probation under G.S. 15A-1343(b)(1) [new criminal offense] or G.S. 15A-1343(b)(3a) [abscond by willfully avoiding supervision]”).

Defendant admitted in open court that he was in willful violation of these regular conditions. Defendant has failed to demonstrate that the ends of justice would be promoted by allowing the petition and issuing the writ. In the exercise of our discretion, we deny Defendant’s petition for writ of certiorari.

**Conclusion**

For the reasons stated herein, Defendant’s petition for writ of certiorari is denied and his appeal is dismissed.

DENIED IN PART AND DISMISSED.

Judge TYSON concurs.

Judge COLLINS dissents in separate opinion.

COLLINS, Judge, concurring in part and dissenting in part.

I concur in the majority opinion to deny Defendant’s petition for writ of certiorari in 17 CRS 054550 and to dismiss his appeal in that case. However, where Defendant’s probation in 17 CRS 054551 was revoked for absconding—a violation not alleged in the probation violation report—I respectfully dissent from the remainder of the majority opinion that leads to its conclusion to deny Defendant’s petition for writ of certiorari in 17 CRS 054551 and to dismiss his appeal in that case.

**I. Factual Background**

Although the majority opinion includes a recitation of the facts, I include a recitation of the facts as well.

On 30 January 2018, Defendant pled guilty in district court to felony breaking and entering in 17 CR 54550, and felony larceny after breaking

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and entering in 17 CR 54551.<sup>1</sup> The trial court sentenced Defendant to two consecutive 8-19 month prison terms, suspended both sentences, and placed Defendant on 24 months' supervised probation.

On 12 March 2018, Defendant's probation officer filed a probation violation report in superior court in 17 CRS 054551 ("March report"). The March report alleged the following probation violations:

1. "Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . ." in that  
OFFENDER FAILED TO REPORT FOR OFFICE VISIT ON 3/7/2018.
2. Condition of Probation "Not possess contraband or stolen goods" in that  
DURING WARRANTLESS SEARCH OFFENDER WAS FOUND TO HAVE STOLEN PROPERTY IN HIS POSSESSION INCLUDING A STOLEN FIREARM. PROPERTY WAS SEIZED BY HENDERSON COUNTY SHERIFFS DEPARTMENT
3. Condition of Probation "Possess no firearm, explosive device or other deadly weapon" in that []  
OFFENDER WAS FOUND TO BE IN POSSESSION OF RIFLE/FIREARM DURING SEARCH OF HIS RESIDENCE ON 3/9/2018. RIFLE WAS TAKEN AS EVIDENCE BY HENDERSON COUNTY SHERIFFS DEPARTMENT.
4. Condition of Probation "Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it . . ." in that  
MARIJUANA AND A HOMEADE WATER BONG WERE FOUND DURING ROUTINE SEARCH OF OFFENDERS RESIDENCE ON 3/09/2018

On 13 July 2018, the probation officer filed a probation violation report in superior court in 17 CRS 054550 ("July report"). The July report alleged the following probation violations:

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1. The district court file numbers were 17 CR 54550 and 17 CR 54551. Upon the filing of the probation violation reports in superior court, the file numbers became 17 CRS 054550 and 17 CRS 054551.

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1. Regular Condition of Probation: General Statute 15A-1343(b) (3a) “Not to abscond, by willfully avoiding supervision or by willfully making the supervisee’s whereabouts unknown to the supervising probation officer” in that,  
OFFENDER LEFT SOUTHERNAIRE MOTEL ROOM NUMBER 12 ON OR ABOUT 6/20/2018 AND HAS FAILED TO MAKE WHEREABOUTS KNOWN THUS ABSCONDING
2. “Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . .” in that  
OFFENDER MISSED OFFICE VISIT ON 3/7/2018.
3. Condition of Probation “Not possess contraband or stolen goods” in that  
OFFENDER WAS IN POSSESSION OF STOLEN ITEMS DURING ROUTINE SEARCH ON 3/09/2018 AT HIS RESIDENCE. ITEMS SEIZED BY HENDERSON COUNTY SHERIFFS DEPARTMENT.
4. Condition of Probation “Possess no firearm, explosive device or other deadly weapon” in that []  
OFFENDER IN POSSESSION OF STOLEN FIREARM DURING ROUTINE SEARCH ON 3/9/2018. WEAPON SEIZED BY HENDERSON COUNTY SHERIFFS DEPARTMENT
5. Condition of Probation “Not use, possess or control any illegal drug or controlled substance unless it has been prescribed for the defendant by a licensed physician and is in the original container with the prescription number affixed on it . . .” in that  
MARIJUANA AND HOMEADE WATER BONG FOUND DURING SEARCH OF OFFENDERS RESIDENCE ON 3/09/2018.
6. General Statute 15A-1343(b)(1) “Commit no criminal offense in any jurisdiction” in that  
WARRANT ISSUED FOR DEFRAUDING DRUG SCREEN ON 3/12/2018 AFTER ATTEMPTING TO PROVIDE URINE IN PLASTIC[] BOTTLE HIDDEN IN PANTS DURING ROUTINE SCREEN.

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7. General Statute 15A-1343(b)(1) “Commit no criminal offense in any jurisdiction” in that  
OFFENDER CHARGED WITH POSSESSION OF  
METHAMPHETAMINE ON 4/08/2018 IN HENDERSON  
COUNTY NC AND OUTSTANDING WARRANT OF  
POSSESSION OF STOLEN MOTOR VEHICLE WITH  
OFFENSE DATE OF 6/20/2018

The trial court held a hearing on the probation violation reports on 24 June 2019.

At the conclusion of the hearing, the trial court announced it was revoking Defendant’s probation in both 17 CRS 054550 and 054551 for absconding. In the written judgment revoking Defendant’s probation in 17 CRS 054550, the trial court found Defendant had willfully violated the terms of his probation as set forth “in Paragraph(s) 1-2, 5 of the Violation Report or Notice dated 07/13/2018.” Similarly, in the written judgment revoking Defendant’s probation in 17 CRS 054551, the trial court found Defendant had willfully violated the terms of his probation as set forth in “in Paragraph(s) 1 of the Violation Report or Notice dated 07/13/2018.”

Defendant filed a written notice of appeal on 2 July 2019.

**II. Discussion**

Defendant argues that the trial court erred by revoking his probation in 17 CRS 054551 for a violation of which he had no notice or, in the alternative, for a violation that was not revocable.

**A. Jurisdiction**

Initially, I address our jurisdiction over this appeal.

Rule 4(a) of the Rules of Appellate Procedure provides that notice of appeal from a criminal case may be taken by “(1) giving oral notice of appeal at trial, or (2) filing notice of appeal with the clerk of superior court and serving copies thereof upon all adverse parties within fourteen days after entry of the judgment or order[.]” N.C. R. App. P. 4(a). Such written notice

shall specify the party or parties taking the appeal; shall designate the judgment or order from which appeal is taken and the court to which appeal is taken; and shall be signed by counsel of record for the party or parties taking the appeal, or by any such party not represented by counsel of record.

N.C. R. App. P. 4(b).



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However, even if a written notice of appeal does not technically comply with Rule 4, “[w]e may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction[.]” *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990). “First, a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake.” *Id.* at 156-57, 392 S.E.2d at 424 (internal quotation marks and citations omitted). “Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the ‘*functional equivalent*’ of the requirement.” *Id.* at 157, 392 S.E.2d at 424 (citation omitted).

In this case, Defendant filed a pro se notice of appeal on 2 July 2019 on what appears to be a pre-printed form for noticing appeal from Henderson County District Court to Henderson County Superior Court. The notice appears in the record as follows:

## NOTICE OF APPEAL

RE: CASE NUMBER 19009692

I, David John Gantt, give Notice of Appeal in the above-referenced case. My case was disposed of on 6/24/19 in Henderson County ~~District~~ Superior Court.

David Gantt  
(Signature of Defendant)

NEXT COURT APPEARANCE:

N/A

(date)

Henderson County Superior Court

The underlined portions of the above form indicate blanks that Defendant filled in by hand. Additionally, Defendant crossed out “District” and wrote in “Superior” Court.

Also on 2 July 2019, the trial court entered Appellate Entries in both 17 CRS 054550 and 17 CRS 054551 indicating that “[D]efendant has given Notice of Appeal to the N.C. Court of Appeals,” and appointing the Appellate Defender to perfect Defendant’s appeal. Appointment of Appellate Counsel by the Appellate Defender was entered 19 August 2019. On 27 August 2019, the transcript of the proceedings was delivered

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to appellate counsel; the assistant district attorney; and the North Carolina Department of Justice, Appellate Section. On 26 September 2019, Defendant served the proposed record on appeal on the State. As the State did not serve on Defendant “a notice of approval of the Proposed Record on Appeal or objections, amendments or alternative Proposed Record on Appeal[.]” the record was settled by operation of N.C. R. App. P. 11(b) and filed on 8 November 2019.

Defendant’s notice of appeal, though timely filed, does not clearly designate the judgments from which he was appealing nor the court to which he was appealing, and failed to attach a certificate of service to confirm service, in violation of N.C. R. App. P. 4. Nonetheless, it can be fairly inferred from Defendant’s “NOTICE OF APPEAL” that he intended to appeal the judgments entered against him on “6/24/19” in Henderson County Superior Court. Indeed, neither the trial court nor the State were unclear that Defendant was appealing the judgments in 17 CRS 054550 and 17 CRS 054551 entered on 24 June 2019 in Henderson County Superior Court. Furthermore, “ ‘since this Court is the only court with jurisdiction to hear [D]efendant’s appeal, it can be fairly inferred [D]efendant intended to appeal to this Court.’ ” *State v. Rouse*, 234 N.C. App. 92, 94, 757 S.E.2d 690, 692 (2014) (quoting *State v. Ragland*, 226 N.C. App. 547, 553, 739 S.E.2d 616, 620, *disc. review denied*, 367 N.C. 220, 747 S.E.2d 548 (2013)). Accordingly, neither of these technical deficiencies are jurisdictional in this case.

Additionally, “a party upon whom service of notice of appeal is required may waive the failure of service by not raising the issue by motion or otherwise and by participating without objection in the appeal[.]” *Hale v. Afro-Am. Arts Int’l, Inc.*, 335 N.C. 231, 232, 436 S.E.2d 588, 589 (1993). The State did not move to dismiss Defendant’s appeal based on lack of service. However, the State did not respond to Defendant’s proposed record on appeal and then raised the issue of jurisdiction in its response to Defendant’s petition for writ of certiorari and in its response brief. Because there is no certificate of service of the notice of appeal and the State has not waived Defendant’s failure to include proof of service of his notice of appeal, this appeal must be dismissed. See *Ribble v. Ribble*, 180 N.C. App. 341, 343, 637 S.E.2d 239, 240 (2006).

However, Defendant has filed a petition for certiorari asking this Court “to review the Judgment and Commitments Upon Revocation of Probation in Henderson County files 17 CRS 54550 and 54551 entered on 24 June 2019[.]” “The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments

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and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . .” N.C. R. App. P. 21(a). “A petition for the writ must show merit or that error was probably committed below. *Certiorari* is a discretionary writ, to be issued only for good and sufficient cause shown.” *State v. Killette*, 834 S.E.2d 696, 698 (N.C. Ct. App. Nov. 5, 2019) (citation and quotation marks omitted). Petitioner must also demonstrate “that the ends of justice will be . . . promoted.” *King v. Taylor*, 188 N.C. 450, 451, 124 S.E. 751, 751 (1924).

On appeal, Defendant argues that the trial court erred in revoking his probation in 17 CRS 054551 but makes no argument regarding the revocation of his probation in 17 CRS 054550. Thus, I concur with the majority’s conclusion to deny Defendant’s petition for writ of certiorari to review the judgment upon revocation of his probation in 17 CRS 054550.

However, in light of Defendant’s timely, albeit technically deficient, pro se Notice of Appeal, and the due process violations that led to the improper revocation of Defendant’s probation, I believe it an abuse of discretion to overlook those violations and deny a petition for writ of certiorari to review the judgment upon revocation of Defendant’s probation in 17 CRS 054551. I would thus grant the petition for writ of certiorari and review the merits of Defendant’s appeal in 17 CRS 054551.

*B. Analysis*

“A probation revocation proceeding is not a formal criminal prosecution, and probationers thus have ‘more limited due process right[s].’ ” *State v. Murchison*, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (quoting *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973), *superseded by statute*, Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 228 (1976)). As a matter of due process, however,

[t]he probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation.

*Black v. Romano*, 471 U.S. 606, 612 (1985) (citing *Gagnon*, 411 U.S. at 786). The General Assembly has effectuated this notice-related due process requirement by enacting N.C. Gen. Stat. § 15A-1345(e), which states in pertinent part:

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Before revoking or extending probation, the court must, unless the probationer waives the hearing, hold a hearing to determine whether to revoke or extend probation and must make findings to support the decision and a summary record of the proceedings. The State must give the probationer notice of the hearing and its purpose, including a statement of the violations alleged.

N.C. Gen. Stat. § 15A-1345(e) (2019). “The purpose of the notice mandated by this section is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act.” *State v. Hubbard*, 198 N.C. App. 154, 158, 678 S.E.2d 390, 393 (2009) (citation omitted).

A defendant’s probation can be revoked only if the defendant (1) commits a criminal offense in any jurisdiction in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds from supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) has already served two periods of confinement for violating other conditions of probation according to N.C. Gen. Stat. § 15A-1344(d2). N.C. Gen. Stat. § 15A-1344(a) (2019); *State v. Williams*, 243 N.C. App. 198, 199-200, 776 S.E.2d 741, 742 (2015).

At the beginning of the hearing on the probation violation reports, Defendant acknowledged, through counsel, that he “waive[d] a formal reading and admit[ted] a willful violation of his probation[.]” The probation officer then purported to read the allegations in the violation reports. After detailing the violations of probation in 17 CRS 054551 alleged in the March report, he added, “Addendum violation, offender left room No. 12 of the Southern Air Motel on or about 6/22/2018 and failed to make his whereabouts known.” However, that violation is not alleged in the March report in 17 CRS 054551, no addendum to the March report appears in the record on appeal,<sup>2</sup> and the State does not argue on appeal that there was an addendum to the March report.

The probation officer then stated that the July report in 17 CRS 054550 alleged “the same violations” as the March report in 17 CRS 054551, with the addition of “a warrant was issued for defrauding a drug screen.

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2. Had an addendum to the March report been erroneously excluded from the proposed record on appeal, the State could have timely served the addendum as an amendment to the proposed record on appeal. See N.C. R. App. P. 11. Moreover, after the record on appeal had been settled, the State could have supplemented the record with the addendum, had it been presented to the trial court. N.C. R. App. P. 9(b)(5) (“If the record on appeal as settled is insufficient to respond to the issues presented in an appellant’s brief . . . , the responding party may supplement the record on appeal with any items that could otherwise have been included pursuant to this Rule 9.”).

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That's since been dismissed. And he had a charge of possession of methamphetamine and an outstanding warrant for possession of a stolen motor vehicle. Those have all been resolved at this time."

The probation officer and defense counsel both recommended the trial court terminate Defendant's probation. The trial court announced, "Well, let me just first make the record or help the record be clear on what it is you're admitting[.]" after which the following dialogue took place:

THE COURT: And 17CRS54551, there are two allegations that I see. One of them is the absconsion, the other is the outstanding warrants for possession of stolen, I guess, property. So apparently no conviction yet in that. You're admitting to absconsion in that?

[DEFENSE COUNSEL]: Yes, Your Honor.

THE COURT: And I'm not sure, the State, I don't think, is pursuing the other. So we will note that the State is pursuing No. 1 in that, and that's admitted. The State is not pursuing No. 2, if I'm correct on that. Does that sound right? Just the conviction for the marijuana that is alleged on the other file which is 17CRS54550. The absconsion, No. 1, is admitted. Is he admitting he missed the visit on March 7 or no?

[DEFENSE COUNSEL]: We will admit that as well, Your Honor.

THE COURT: Okay. Number 2 is admitted. Not possess contraband is No. 3. Possess no firearm is No. 4. It sounds like you're saying, Mr. Collis, we're not pursuing those. The State is not pursuing those?

....

PROBATION OFFICER: It was a violation of his probation, but he was never charged with that.

THE COURT: All right. Well, I will just note it denied. And -- and State is not pursuing it in a hearing format today. And I'll -- with no evidence, I'll just find he's not in violation of 3 and 4 on that. And then No. 5, admitting the homemade water [bong] and marijuana, I gather, because of the possession charged, that you are admitting?

[DEFENSE COUNSEL]: Number 5, Your Honor?

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THE COURT: On that file, yes, sir.

[DEFENSE COUNSEL]: Yes, Your Honor. We will admit that.

THE COURT: 1 and 5 on that are admitted. 3 and 4, I'm finding, are dismissed.

Immediately after this colloquy, the trial court announced as follows:

And so in response, let's see, I'll order that the earlier -- that [Defendant's] probation be revoked. And I will just address 17CRS54550 first.

....

So with respect to the file ending in 550, the probation is revoked. The earlier suspended sentence of minimum of 8, maximum of 19, is ordered activated.

....

With respect to the other file, 17CRS54551, again, I will note the absconsion and revoke probation. The earlier suspended sentence of a minimum of 8, maximum 19 is -- was to run at the expiration of the one I just mentioned, and so that would be activated as a consecutive sentence.

Here, the trial court stated that it saw two allegations in 17 CRS 054551, one of which was absconsion. It then asked defense counsel if Defendant was admitting to absconsion, and defense counsel answered in the affirmative. The trial court noted that "the State is pursuing No. 1 in that, and that's admitted." However, there is no allegation of absconding in 17 CRS 054551. The first paragraph of the March report in 17 CRS 054551 alleges that Defendant violated the condition of his probation that he "[r]eport as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . ." in that he failed to report to an office visit on 3/7/2018.

The first paragraph of the July report in 17 CRS 054550 does allege that Defendant violated the condition of probation "[n]ot to abscond" in that he "left Southernaire motel room number 12 on or about 6/20/2018 and has failed to make whereabouts known thus absconding." (original in all capital letters). After inquiring about the absconding allegation, the trial court then inquired sequentially about the remaining allegations in the July report in 17 CRS 054550. Thus, it is apparent that the trial court's line of questioning pertained to 17 CRS 054550 in the July report.

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After its questioning, the trial court orally found the allegations in paragraphs 1, 2, and 5 admitted and dismissed allegations in paragraphs 3 and 4 in 17 CRS 054550 in the July report. The trial court then stated, “With respect to the other file, 17CRS054551, again, I will note the absconson and revoke probation.” In the written judgment revoking Defendant’s probation in 17 CRS 054550, the trial court found Defendant had willfully violated the terms of his probation as set forth in paragraphs 1, 2, and 5 of the violation report in 17 CRS 054550 “dated 07/13/2018.” In the written judgment revoking Defendant’s probation in 17 CRS 054551, the trial court found Defendant had willfully violated the terms of his probation as set forth in paragraph 1 of the violation report in 17 CRS 054550 “dated 07/13/2018.”

The allegations contained in the July report in 17 CRS 054550 were insufficient to put Defendant on notice of a violation in 17 CRS 054551. Two different judgments suspending the sentences were entered with two different file numbers—17 CRS 054550 and 17 CRS 054551—for two different offenses; separate violation reports were filed in each case, with four months in between the report filed in 17 CRS 054551 and the report filed in 17 CRS 054550; and the violation reports did not contain the same allegations. As absconding was not alleged in the March report in 17 CRS 054551, Defendant was not on notice that he could be found to have violated his probation for absconding or that his probation could be revoked for absconding in 17 CRS 054551.

Furthermore, even if the written judgment in 17 CRS 054551 is treated as containing a clerical error in referring to the violation report “dated 07/13/2018” and we instead look to the violation report filed in that case on 12 March 2018, the allegation in paragraph 1—“Report as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places . . .’ in that OFFENDER FAILED TO REPORT FOR OFFICE VISIT ON 3/7/2018”—does not, without more, allege absconding in violation of N.C. Gen. Stat. § 15A-1343(b)(3a). *See State v. Johnson*, 246 N.C. App. 139, 142, 783 S.E.2d 21, 24 (2016) (“[A] defendant informing his probation officer he would not attend an office visit the following day and then subsequently failing to report for the visit, does not, without more, violate N.C. Gen. Stat. § 15A-1343(b)(3a) when these *exact actions* violate the explicit language of a wholly separate regular condition of probation which does not allow for revocation and activation of a suspended sentence.”). Instead, paragraph 1 alleges a violation of the condition of probation that Defendant “[r]eport as directed by the Court, Commission or the supervising officer to the officer at reasonable times and places[,]” as specifically alleged by the State in the March report. A violation of this condition is a non-revocable violation.



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The State argues that Defendant was on notice that his probation could be revoked in 17 CRS 054551 because “the March 2018 report alleged that Defendant possessed a stolen firearm and possessed marijuana and drug paraphernalia, all of which constitute criminal offenses in North Carolina, which makes those actions grounds for probation revocation under [N.C. Gen. Stat.] § 15A-1343(b)(1) (commit no criminal offense in any jurisdiction).” This argument is meritless.

First, the March report alleged that Defendant’s behavior violated the regular terms of probation that he “possess no firearm” under N.C. Gen. Stat. § 15A-1343(b)(5) and “[n]ot use, possess or control any illegal drug or controlled substance” under § 15A-1343(b)(15). The violation of either of these conditions of probation is not a revocable violation. *Williams*, 243 N.C. App. at 200, 776 S.E.2d at 743. Furthermore, while the notice required by N.C. Gen. Stat. § 15A-1345(e) “requires only a statement of the actions that violated the conditions, not of the conditions that those actions violated[,]” *State v. Moore*, 370 N.C. 338, 341, 807 S.E.2d 550, 553 (2017), due process under the Federal Constitution and our state statute “requires a specific description of the condition of probation violated . . . and *not* simply a description of the behavior that constituted the violation.” *Id.* at 356, 807 S.E.2d at 561 (Beasley, J. dissenting); *see id.* at 345, 807 S.E.2d at 555 (explaining that the majority opinion addresses only the statutory notice required by N.C. Gen. Stat. § 15A-1345(e) and does not address a due process or the Fourteenth Amendment argument). As the March report did not allege that Defendant violated the condition of his probation that he commit no crime, the March report did not put Defendant on notice that his probation could be revoked under N.C. Gen. Stat. § 15A-1343(b)(1). Finally, neither the behavior alleged, nor the conditions alleged to have been violated, put Defendant on notice that he could be found to have violated his probation for *absconding* or that his probation could be revoked for *absconding*. *See Hubbard*, 198 N.C. App. at 158, 678 S.E.2d at 393 (“The purpose of the notice mandated by [N.C. Gen. Stat. § 15A-1345(e)] is to allow the defendant to prepare a defense and to protect the defendant from a second probation violation hearing for the same act.”) (citation omitted).

### III. Conclusion

As the trial court erred by revoking Defendant’s probation in 17 CRS 054551 for a violation of which he had no notice or, in the alternative, for a violation that was not revocable, I would reverse the judgment entered upon the revocation of Defendant’s probation in 17 CRS 054551.



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[271 N.C. App. 487 (2020)]

STATE OF NORTH CAROLINA

v.

JOSHUA GRAPPO, DEFENDANT

No. COA19-734

Filed 19 May 2020

**1. Appeal and Error—criminal law—trial court’s statutory duty to instruct the jury—instructions read to jury by clerk—no objection—appellate review**

Where, in a trial for second-degree murder and drug offenses, the trial court notified the State and defendant it intended to have the clerk “help me with reading the instructions to the jury,” defendant did not invite error when his counsel stated he had no objection since it was not clear that the trial court intended to relinquish its duty to charge the jury. Because the trial court had a statutory duty to instruct the jury pursuant to N.C.G.S. § 15A-1231 and -1232, defendant did not waive appellate review by failing to object when the clerk began reading the jury instructions since the right to appeal the trial court’s violation of a statutory mandate was automatically preserved for appellate review.

**2. Criminal Law—jury instructions—portion of instructions read by clerk—prejudice analysis**

Although the trial court committed manifest error by having the clerk read to the jury portions of the jury instructions in a case involving second-degree murder and drug offenses, the error was not prejudicial where the trial judge told the jury the clerk would help her read some of the instructions and they should listen to the clerk, the judge interjected to correct several misstatements of the instructions by the clerk, the jury reached its verdict without the need for additional clarification, and defendant’s counsel informed the trial court that he did not have any additions or corrections to the instructions.

**3. Sentencing—prior record level—dates of conviction—motion for appropriate relief**

Where defendant contended that the conviction dates for the stipulated prior convictions listed on his prior record worksheet were incorrect and the convictions were improperly used to calculate his prior record level for sentencing, and the State did not concede that the conviction dates were incorrect, resolution of the issue required consideration of evidence outside the settled record

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on appeal and defendant's motion for appropriate relief was dismissed without prejudice to re-file it in the trial court.

Appeal by Defendant from judgments entered 28 January 2019 by Judge Phyllis M. Gorham in Onslow County Superior Court. Heard in the Court of Appeals 15 April 2020.

*Attorney General Joshua H. Stein, by Senior Deputy Attorney General Amar Majmundar, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for Defendant.*

INMAN, Judge.

"It is desirable in criminal matters to adhere to the established practice. Innovations usually result in prolonged litigation." *State v. Benton*, 226 N.C. 745, 747-48, 40 S.E.2d 617, 618 (1946) (citation omitted). The wisdom of our Supreme Court's words more than 70 years ago is manifest in this appeal, which stems from a trial court's decision to forego its statutory duty to charge the jury by instead having a courtroom clerk read aloud significant portions of the instructions to the jury. Although we agree with Defendant that the judge's act constituted error—one that we emphasize should not be repeated by members of the trial bench in the future—we hold that Defendant has failed to demonstrate prejudice warranting a new trial.

Defendant also requests we remand this case for resentencing pursuant to a motion for appropriate relief ("MAR") filed with this Court. Because Defendant's MAR raises an evidentiary question and relies on matters not found in the settled record on appeal, we dismiss his MAR without prejudice to him re-filing one with the trial court.

**I. FACTUAL AND PROCEDURAL HISTORY**

The evidence introduced at trial discloses the following:

On 23 June 2016, Joseph Allen purchased opioids from Defendant at Allen's home in Snead's Ferry. After Defendant left the premises, Allen took a dose and collapsed on the bathroom floor. Allen's girlfriend, Shannon Connor, found him unconscious in the bathroom and phoned Defendant for help; Defendant answered, told Connor to call 9-1-1, and returned to the house with two women a short time later. Defendant and one of the women attempted to resuscitate Allen but were unsuccessful. Defendant left the scene before paramedics arrived. Allen was

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taken to the hospital, and the next day providers pronounced him brain dead from prolonged cardiac arrest caused by a drug overdose.

A few weeks later, on 22 July 2016, police detained Defendant and his girlfriend during a routine traffic stop. During the stop, Defendant's girlfriend informed police that she was hiding heroin inside her pants. A search of Defendant, his girlfriend, and the vehicle uncovered 106 individual bags of opioids. Defendant was arrested and indicted on charges arising from both the traffic stop and Allen's death, including, among others: (1) felony conspiracy to possess heroin; (2) maintaining a vehicle; (3) possession with intent to sell or deliver heroin; (4) possession with intent to sell or deliver fentanyl; (5) selling fentanyl; (6) delivering fentanyl; and (7) second-degree murder.

Defendant's charges were joined for trial beginning 14 January 2019. After all evidence had been presented, counsel had participated in a charge conference, and closing arguments were presented to the jury, the trial court called a five-minute recess. Following the recess, but before the jury returned to the courtroom, the trial judge engaged in the following discussion with counsel:

**THE COURT:** I'm going to have the clerk to help me with the reading. Any objection from the [S]tate?

**[THE STATE]:** Not from the [S]tate, Judge.

**THE COURT:** Any objection?

**[DEFENDANT'S COUNSEL]:** I'm sorry, Judge, I was talking.

**THE COURT:** I'm going to have the clerk to help me with reading the instructions to the jury.

**[DEFENDANT'S COUNSEL]:** No objection.

The trial court called the jury back into the courtroom and announced that, "I'm going to read you the instructions, and the clerk is going to help me to read some of these instructions. So listen to the instructions as she is reading them." The clerk then read a significant portion of the jury instructions, including instructions on: (1) the function of the jury; (2) the presumption of innocence; (3) the State's burden of proof and the definition of reasonable doubt; (4) the jury's duty in evaluating the credibility of witnesses; (5) the weight of the evidence; (6) the definitions of direct and circumstantial evidence; and (7) the effect of Defendant's decision not to testify. When the clerk misread some of these instructions, the judge interjected to offer corrections. The clerk concluded

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reading her portion of the instructions, after which the trial judge read the remainder of the instructions focusing on the specific charges and factual findings required by the jury to convict Defendant.<sup>1</sup>

The jury ultimately returned guilty verdicts on each charge with the exception of second-degree murder; the jury instead found Defendant guilty of involuntary manslaughter, a lesser-included offense. Defendant timely appealed.

## II. ANALYSIS

### A. *Preservation*

[1] Defendant's single argument on appeal posits that the trial court violated its statutory duty to instruct the jury consistent with N.C. Gen. Stat. §§ 15A-1231 and -1232. The State contends that Defendant's trial counsel did not preserve this issue and, because counsel affirmatively stated he had no objection, invited any alleged error. *See, e.g., State v. Barber*, 147 N.C. App. 69, 74, 554 S.E.2d 413, 416 (2001) (“[A] defendant who invites error has waived his right to all appellate review concerning the invited error, including plain error review.” (citation omitted)).

We are not persuaded that Defendant's trial counsel invited error because it is not clear from the record that the judge put counsel on notice that she actually intended to relinquish to the clerk her duty to charge the jury. A practitioner could very easily interpret the judge's statement that she would “have the clerk to help *me with reading*” to mean that the judge would read the full instructions with some other form of assistance from the clerk. For example, one could easily take the statement to mean that the judge would read the instructions while the clerk handed printed copies up to the bench or, alternatively, followed along silently to catch any mistakes made by the judge in reading the instructions aloud. Defendant could reasonably presume that the trial court would still perform its necessary judicial functions in charging the jury and, given that the trial court's statement is subject to straightforward interpretations that do not involve an abdication of any necessary statutory duties, we decline to hold that Defendant's failure to object to the trial court's statement amounts to invited error.

We are not persuaded that Defendant was required to object *sua sponte* once the courtroom clerk spoke in place of the trial court during

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1. There is no indication in the record that the jury received written copies of the jury instructions.

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portions of the instructions because a trial court's violation of a statutory mandate is automatically preserved for appellate review. *See, e.g., State v. Ashe*, 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985) (“[W]hen a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court’s action is preserved, notwithstanding defendant’s failure to object at trial.”).

*B. Standard of Review*

**[2]** Defendant argues that the trial court violated the statutory mandates found in N.C. Gen. Stat. §§ 15A-1231 and -1232 by allowing the clerk to read some jury instructions and, in doing so, gave the jury the impression that those instructions were less important than those read aloud by the judge herself. Whether a trial court violated a statutory mandate is subject to *de novo* review. *State v. Lyons*, 250 N.C. App. 698, 705, 793 S.E.2d 755, 761 (2016) (citation omitted).

To obtain relief for this type of error, Defendant must show that he was prejudiced. “Whether the judge’s comments, questions or actions constitute reversible error is a question to be considered in light of the factors and circumstances disclosed by the record, the burden of showing prejudice being upon the defendant.” *State v. Blackstock*, 314 N.C. 232, 236, 333 S.E.2d 245, 248 (1985) (citations omitted). “[I]n a criminal case it is only when the jury may reasonably infer from the evidence before it that the trial judge’s action intimated an opinion as to a factual issue, the defendant’s guilt, the weight of the evidence or a witness’s credibility that prejudicial error results.” *Id.* (citing *State v. Yellorday*, 297 N.C. 574, 256 S.E.2d 205 (1979)). The intimated opinion must “‘have had a prejudicial effect on the result of the trial’ ” to warrant reversal. *State v. Larrimore*, 340 N.C. 119, 155, 456 S.E.2d 789, 808 (1995) (quoting *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950)). Otherwise, “‘the error will be considered harmless.’ ” *Id.*

We note that Defendant does not argue the error in this case amounts to structural error, which “is a rare form of constitutional error resulting from structural defects in the constitution of the trial mechanism which are so serious that a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.” *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744 (2004) (citations and quotation marks omitted). “Structural error, no less than other constitutional error, should be preserved at trial,” *id.* at 410, 597 S.E.2d at 745 (citations omitted), and Defendant did not argue the existence of a structural constitutional error before the trial court.

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*C. Error*

The trial court committed error in failing to instruct the jury consistent with our General Statutes. N.C. Gen. Stat. § 15A-1231(c) plainly states that “the *judge* must instruct the jury in accordance with G.S. 15A-1232[.]” (emphasis added), and N.C. Gen. Stat. § 15A-1232 provides that “[i]n instructing the jury, *the judge* shall not express an opinion[.]” (emphasis added). Our caselaw also holds that “[a] *trial judge* is required by N.C.G.S. § 15A-1231 and N.C.G.S. § 15A-1232 to instruct the jury on the law arising on the evidence.” *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (emphasis added). Said differently, “[a] *judge* has the obligation to instruct the jury on every substantive feature of the case.” *State v. Smith*, 360 N.C. 341, 347, 626 S.E.2d 258, 261 (citations and quotation marks omitted) (emphasis added). Our Supreme Court has directed “the *members of the trial bench* to refrain from avoiding the *necessity* for instructing the jury[.]” *State v. Fletcher*, 370 N.C. 313, 326 n. 6, 807 S.E.2d 528, 538 n. 6 (2017) (emphasis added). One of the instructions delegated to the clerk described the State’s burden of proof. This Court has previously held that there is “a duty upon *the presiding judge* to instruct the jury as to the burden of proof upon each issue arising upon the pleadings.” *State v. Tyson*, 195 N.C. App. 327, 335, 672 S.E.2d 700, 706 (2009) (citation omitted) (emphasis added). Simply put, the error in this case is manifest.

*D. Prejudice*

Whether the trial court’s error amounts to prejudicial error is the more difficult question posed by this appeal. Complicating matters is the importance that the trial judge give the jury charge—and the significance of the particular delegated instructions. As we have recently recognized, “[t]he jury charge is one of the most critical parts of a criminal trial. *The trial court’s duty is momentous*: to deliver a clear instruction on the law arising from all the evidence presented, and to do so in such a manner as to assist the jury in understanding the case and in reaching the correct verdict.” *State v. Corbett*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 839 S.E.2d 361, \_\_\_ (2020) (citations and quotation marks omitted) (emphasis added); see also *Carter v. Kentucky*, 450 U.S. 288, 303, 67 L. Ed. 2d 241, 252 (1981) (recognizing the “unique power of the jury instruction” in protecting criminal defendants’ constitutional rights).

Several of the jury instructions that the trial judge delegated to the clerk are so foundational as to be given in virtually every case. For example, our Supreme Court has emphasized that “[t]he rule as to the burden of proof is important and indispensable in the administration

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of justice, and constitutes a substantial right of the party upon whose adversary the burden rests. It should, therefore, be jealously guarded and rigidly enforced by the courts.” *State v. Falkner*, 182 N.C. 793, 798, 108 S.E. 756, 758 (1921). The necessity that the jury understand this burden is beyond any serious dispute. *See, e.g., Hope v. Cartledge*, 857 F.3d 518, 527 (4th Cir. 2017) (observing that “the Supreme Court [of the United States has] recognized the importance of accurate, explicit, and complete jury instructions where laymen are required to understand the government’s burden”). Further, at least one of the instructions given by the clerk in this case was required to vindicate Defendant’s constitutional rights. *See Carter*, 450 U.S. at 303, 67 L. Ed. 2d at 252 (holding that when a defendant declines to testify and requests an instruction on that point, a trial judge must give such an instruction under the Fifth Amendment, as “[a] trial judge has a powerful tool at his disposal to protect the constitutional privilege—the jury instruction—and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment.”). The fact that some of the instructions given by the clerk may not have been strictly required in all cases<sup>2</sup> does not deprive them of their value to the jury. *See, e.g., Taylor v. Kentucky*, 436 U.S. 478, 484, 56 L. Ed. 2d 468, 474 (1978) (“While the legal scholar may understand that the presumption of innocence and the prosecution’s burden of proof are logically similar, the ordinary citizen well may draw significant additional guidance from an instruction on the presumption of innocence.”).

Although the procedure employed by the trial court in this case carries with it a high risk of prejudice, we nonetheless hold that Defendant has not shown prejudicial error in this case. We agree with Defendant that the delegation of certain instructions to the clerk could possibly have lead jurors to “reasonably infer . . . that the trial judge’s action intimidated an opinion” that those instructions were of comparatively lesser importance than those rendered by the judge. *Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248 (citation omitted). But Defendant has not shown that the inferred expression of that opinion “had a prejudicial effect on the result of the trial” necessary to elevate it from a harmless error to a

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2. Although “[t]he principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law[.]” *Coffin v. United States*, 156 U.S. 432, 453, 39 L. Ed. 481, 491, (1895), the failure to give an instruction on that presumption does not amount to reversible error “when the trial court has clearly defined the offense and placed the burden of proof beyond a reasonable doubt upon the state to find the defendant guilty.” *State v. Allah*, 168 N.C. App. 190, 195, 607 S.E.2d 311, 315 (2005) (citations omitted).



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prejudicial one. *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808 (citation and quotation marks omitted).

Mindful of the totality of the circumstances test applicable in this case, *Blackstock*, 314 N.C. at 236, 333 S.E.2d at 248, various portions of the record undercut a conclusion of prejudicial effect. First, the trial judge instructed the jury “the clerk is going to help me to read some of these instructions. So listen to the instructions as she is reading them.” We “presume[] that jurors follow the trial court’s instructions,” *State v. Steen*, 352 N.C. 227, 249, 536 S.E.2d 1, 14 (2000) (citation omitted), and therefore presume that the jury did, in fact, listen to the jury instructions read to them by the clerk. Second, the trial judge interjected several times to correct several misstatements of the instructions by the clerk, conveying a belief by the trial judge of the importance that the instructions read by the clerk be accurate and complete. Third, the jury reached its verdict without seeking clarification from the trial court as to any issue or instruction, indicating that the instructions were properly understood. Lastly, when asked by the judge if he had “any additions, corrections [or] comments on the instructions” after they were given, Defendant’s counsel replied “No, Your Honor. Thank you[,]” indicating Defendant’s apparent satisfaction with the instructions and the manner in which they were rendered. Under these circumstances, and absent more, we cannot conclude that the trial court’s error “had a prejudicial effect on the result of the trial.” *Larrimore*, 340 N.C. at 155, 456 S.E.2d at 808.

*E. Defendant’s MAR*

[3] In the MAR filed with this Court, Defendant argues that the trial court erred in calculating his prior record level. Specifically, he contends that the dates of his stipulated prior convictions as listed on his prior record worksheet conflict with the dates on which those convictions were actually entered. Because the judgments attached to Defendant’s MAR show that several convictions were originally entered on the same date, rather than different dates as listed on the worksheet, Defendant asserts that some of those convictions should not have been used to elevate his prior record level from III to IV. *See* N.C. Gen. Stat. § 15A-1340.14(d) (2019) (providing that only the most severe conviction entered in a single session of superior court may be used to calculate a defendant’s prior record level). He requests that we grant the MAR and remand for resentencing or, in the alternative, remand the MAR to the trial court for an evidentiary hearing. The State asks that we either dismiss the MAR without prejudice to Defendant re-filing the motion with



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the trial court—as the documents attached in the MAR are not in the settled record on appeal—or deny the MAR on the merits.

We agree with the State that it is most appropriate to dismiss Defendant's MAR without prejudice to re-filing it with the trial court. The State does not concede that Defendant was not convicted of the crimes listed in his prior record level worksheet on the dates stated therein, and resolution of Defendant's MAR turns on a factual issue requiring the consideration of evidence outside the settled record on appeal. *See, e.g., State v. Verrier*, 173 N.C. App. 123, 132, 617 S.E.2d 675, 681 (2005) (dismissing a defendant's MAR without prejudice to re-filing it with the trial court, "[m]indful that it is more within the province of a trial court rather than an appellate court to make factual determinations"). The trial court is best equipped to hear Defendant's MAR and take additional evidence as necessary.

**III. CONCLUSION**

The trial court, in allowing the clerk to read certain portions of the jury instructions, committed error. Such a procedure may readily give rise to prejudice, and, echoing our Supreme Court, "we urge the members of the trial bench to refrain from avoiding the necessity for instructing the jury[.]" *Fletcher*, 370 N.C. 313, 326 n. 6, 807 S.E.2d 528, 538 n. 6. We cannot overstate the importance that the trial judge—and not a clerk—fulfill the duty "to instruct the jury on every substantive feature of the case." *Smith*, 360 N.C. at 347, 626 S.E.2d at 261 (citations and quotation marks omitted). However, we hold that the error committed here was harmless and, as a result, leave the judgments entered below undisturbed. We also dismiss Defendant's MAR without prejudice so that he may re-file a motion with the trial court.

**NO PREJUDICIAL ERROR; MOTION FOR APPROPRIATE RELIEF  
DISMISSED WITHOUT PREJUDICE.**

Judges DIETZ and DILLON concur.

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STATE OF NORTH CAROLINA

v.

DAQUEZZ SEMAJ HAUSER, DEFENDANT

No. COA19-313

Filed 19 May 2020

**1. Evidence—accidental display of inadmissible evidence—prejudice—curative jury instruction**

At a trial for obtaining property by false pretenses, where defendant was prosecuted for selling boxes purportedly containing cell phones that actually contained lug nuts, and where the prosecutor inadvertently displayed an image to the jury resembling an exhibit that had been excluded from evidence and showing defendant standing in front of a mirror, wearing gold necklaces, and holding several phones, the trial court did not abuse its discretion by instructing the jury to disregard the image instead of declaring a mistrial. The court's instruction sufficiently cured any prejudice to defendant because there was sufficient evidence that defendant knew his claims regarding the phones were fraudulent (a key issue at trial), and defendant did not overcome the presumption that the jury was able to understand and comply with the instruction.

**2. Sentencing—clerical error—written judgment—checked box—wrong punishment**

At defendant's sentencing for obtaining property by false pretenses, a box checked next to "community punishment" on the written judgment was a clerical error where the sentencing hearing transcript showed the trial court had ordered an intermediate punishment under N.C.G.S. § 15A-1340.17(c), and where other sections of the judgment reflected an intermediate punishment. Thus, the written judgment was remanded to correct the error.

Appeal by Defendant from judgment entered 3 October 2018 by Judge G. Bryan Collins, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 2 October 2019.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Victoria L. Voight, for the State.*

*Erica W. Washington for defendant-appellant.*

MURPHY, Judge.

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A trial court abuses its discretion when its ruling “is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.” *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Defendant fails to show the court abused its discretion in denying his motion for a mistrial following the inadvertent display of an image to the jury that bore similarity to one which had been excluded from evidence. We evaluate the prejudicial effect of the erroneous evidence by considering the “nature of the evidence and the circumstances of the particular case.” *State v. Aldridge*, 254 N.C. 297, 300, 118 S.E.2d 766, 768 (1961). In light of the nature of the erroneously displayed photograph, the trial court did not err in instructing the jury to disregard the image instead of declaring a mistrial.

However, we remand for correction of a clerical error in the written judgment to reflect a sentence of intermediate punishment, rather than community punishment, consistent with the trial court’s intermediate punishments, as pronounced in Defendant’s presence.

**BACKGROUND**

Daquazz Semaj Hauser, Defendant, was indicted for obtaining property by false pretenses by selling boxes purportedly containing iPhones that contained only lug nuts. At trial, the State attempted to introduce State’s Exhibit 17, a photograph of Defendant taken from his personal Facebook page. The photograph depicted Defendant posing expressionless with three cell phones. Defendant objected to the admission of the photograph and the trial court sustained the objection, having applied the Rule 403 balancing test. The State then sought to introduce State’s Exhibit 18, which included photographs of the vehicles of both Defendant and the individuals who had sought to purchase phones from him. Exhibit 18 was admitted without objection.

However, in attempting to publish Exhibit 18 on the courtroom’s overhead video display to the jury, the desktop screen of the State was shown instead. The desktop screen displayed a picture of Defendant holding several phones, wearing gold necklaces, and standing in front of a mirror. The prosecutor’s screen was visible for several seconds before being removed. At the bench conference that followed, Defendant moved for a mistrial based on the potentially prejudicial nature of the photograph and its similarity to State’s Exhibit 17, which had been ruled inadmissible shortly before. The trial court denied the mistrial request but instructed the jury to “disregard anything that might have flashed up on the screen right then.”

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Defendant was found guilty of obtaining property by false pretenses and sentenced to a suspended sentence of 6 to 17 months, with 36 months probation. An 89-day active term was imposed as a special condition of Defendant's suspended sentence. Defendant appealed and later requested to amend the Record to include a more complete narrative regarding the projection of the desktop screen and the bench conference that followed. The trial court subsequently granted that motion, pursuant to N.C. R. App. P. 11(c), and agreed with Defendant's narrative summary.

**ANALYSIS****A. Mistrial**

[1] "The decision to grant or deny a mistrial rests within the sound discretion of the trial court and will be reversed on appeal only upon a clear showing that the trial court abused its discretion." *State v. Hurst*, 360 N.C. 181, 188, 624 S.E.2d 309, 316 (2006) (internal quotation marks omitted). "A mistrial should be granted only when there are improprieties in the trial so serious that they substantially and irreparably prejudice the defendant's case and make it impossible for the defendant to receive a fair and impartial verdict." *State v. Warren*, 327 N.C. 364, 376, 395 S.E.2d 116, 123 (1990); N.C.G.S. § 15A-1061 (2019). "[A] trial court's decision concerning a motion for mistrial will not be disturbed on appeal unless there is a clear showing that the trial court abused its discretion." *State v. Bonney*, 329 N.C. 61, 73, 405 S.E.2d 145, 152 (1991). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Hennis*, 323 N.C. at 285, 372 S.E.2d at 527. "The trial court's decision in this regard is to be afforded great deference since the trial court is in a far better position than an appellate court to determine whether the degree of influence on the jury was irreparable." *State v. King*, 343 N.C. 29, 44, 468 S.E. 2d 232, 242 (1996).

"Our system of justice is based upon the assumption that trial jurors are women and men of character and of sufficient intelligence to fully understand and comply with the instructions of the court, and are presumed to have done so." *State v. Hines*, 131 N.C. App. 457, 462, 508 S.E.2d 310, 314 (1998) (internal quotation marks and citations omitted). Accordingly, when a trial court acknowledges an evidentiary error "and instructs the jury to disregard it, the refusal to grant a mistrial based on the introduction of the evidence will ordinarily not constitute an abuse of discretion." *State v. Barts*, 316 N.C. 666, 684, 343 S.E.2d 828, 840 (1986); see *State v. Upchurch*, 332 N.C. 439, 450, 421 S.E.2d 577, 583 (1992) (stating that "[w]hen a court properly instructs jurors not to

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consider certain statements, any prejudice is ordinarily cured”). Indeed, we “have generally held that where inadmissible evidence is published to the jury, a trial court may cure this error by instructing the jury not to consider that specific evidence.” *Hines*, 131 N.C. App. at 462-63, 508 S.E.2d at 314.

However, a trial court abuses its discretion by not granting a mistrial when the jurors cannot recall which information they must exclude from their consideration, whether due to the large amount of evidence at issue, the insufficiently detailed cautionary instruction itself, or a combination of the two. *Id.* In *Hines*, we held that a jury must be able to differentiate the improper evidence from proper evidence, and that a mistrial is appropriate when the jury cannot do so. *Id.*, 131 N.C. App. at 463-464, 508 S.E.2d at 314-315. Additionally, a trial court’s instruction must clearly and completely identify the evidence that the jury must disregard, and failure to so instruct is error. *Id.* While these factors were present in *Hines*, neither are present in this case.

By contrast, a trial court does not abuse its discretion upon “immediate and thorough curative action taken by the trial court” to clearly and completely identify the evidence the jury must disregard. *Barts*, 316 N.C. at 684, 343 S.E.2d at 840. In *Barts*, the Supreme Court held that a single, discrete incident of improper testimony where multiple robbery “jobs” were referenced, instead of just one, could be cured. *Id.* There, the trial court asked the jury if they could disregard the improper testimony and all jurors responded affirmatively. *Id.*

“In some cases, however, the cautionary admonitions of the trial judge are ineffective to erase from the minds of a jury the effects of prejudicial errors.” *Hines*, 131 N.C. App. at 463, 508 S.E.2d at 314 (internal quotation marks omitted). “Whether the erroneous admission of . . . evidence . . . should be deemed cured and held nonprejudicial . . . depend[s] largely upon the nature of the evidence and the circumstances of the particular case.” *Aldridge*, 254 N.C. at 300, 118 S.E.2d at 768.

Per *Aldridge*, we consider “the nature of the evidence and the circumstances” of Defendant’s case, such as the nature of the evidence erroneously admitted and the principle issue in contention at Defendant’s trial. *Id.* Here, Defendant was indicted and convicted of obtaining property by false pretenses. At trial, “a key element of [obtaining property by false pretenses was] that [Defendant’s] representation [to the victims was] intentionally false and deceptive.” *State v. Compton*, 90 N.C. App. 101, 103, 367 S.E.2d 353, 354 (1988). “A person’s intent is seldom provable by direct evidence, and must usually be shown through circumstantial evidence.” *Compton*, 90 N.C. App. at 104, 367 S.E.2d at 355. For

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instance, in a case where the defendant obtained insurance proceeds by false pretenses, we held the defendant's failure to respond to her insurance company and failure to attend or reschedule an examination "raised a reasonable inference as to her awareness that her claims were fraudulent." *State v. Holanek*, 242 N.C. App. 633, 651, 776 S.E.2d 225, 238 (2015).

As in *Holanek*, the present case included enough evidence for a reasonable inference that Defendant was aware his claims were fraudulent. Prior to the transactions taking place, Defendant had been in regular communication with the victims through Facebook and text message regarding the sales but immediately ceased all contact once the transactions had taken place. As a condition of each sale, Defendant forbade the purchasers from opening the boxes prior to his receiving payment and he left the premises (running in one case) before the boxes were opened. The circumstantial evidence of Defendant's behavior "raised a reasonable inference as to [his] awareness" that his actions were fraudulent. *Id.*

In considering the nature of the erroneous evidence, we look to the Record. The trial court approved the following "appropriate and factually accurate" narrative:

. . . During [Defendant]'s trial, the prosecutor offered State's Exhibit 18, a photo of the vehicle [Defendant] drove, into evidence without objection. The prosecutor then moved to publish Exhibit 18 to the jury using the courtroom's overhead video display. (Tp. 303). The Court video system displays to a large screen that is in view of the jury, and on a smaller screen in front of defense counsel and the judge. The Court granted the prosecutor's motion to publish Exhibit 18 (Tp. 303). The prosecutor, unable to locate a digital copy of Exhibit 18, displayed her desktop file explorer screen to the jury instead.

*Her desktop file screen displayed an image of [Defendant] with several phones in hand, wearing gold necklaces, and standing in front of a mirror. Three minutes earlier, the Court had not allowed State's Exhibit 17, a very similar image, into evidence based upon a Rule 403 analysis. (See Tp. 301). (emphasis added).*

Once defense counsel noticed the image displayed, an objection was made. At 10:43:50 the prosecutor apologized and the screen display was disconnected. (Tp. 303).

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A bench conference was held off the record and out of the hearing of the jury. Defense counsel contended at the bench conference that the photo and the list of descriptive file names on the desktop screen were prejudicial to [Defendant] and counsel moved for a mistrial. The Court denied that motion. Following the conference, the Court gave the jury a limiting instruction, telling them to “disregard anything that might have flashed up on the screen right then.” (Tp. 304).

The Record does not contain an image of the desktop screen, but the transcript is in accord with the Record Supplement’s narrative:

[Prosecutor]: Did – but you also looked through his Facebook page; is that right?

[Detective]: Yes.

[Prosecutor]: And found some images?

[Defense]: Objection.

THE COURT: Approach the bench. Let me see those while we are at it.

(A bench conference was held off the record and out of the hearing of the jury . . . .)

THE COURT: All right. Under a Rule 403 analysis, the State’s proffer of [Exhibit 17] is not allowed. The defendant’s objection is sustained . . . [.] All right.

. . .

[Prosecutor]: Your Honor, I offer State’s Exhibit Number 18 and ask that it be published.

[Defense]: No objection.

THE COURT: Without objection let it be received, and motion to publish is allowed.

(State’s Exhibit Number 18 was received into evidence.)

[Defense]: Your Honor, objection.

[Prosecutor]: Oh, sorry.

[Defense]: May we approach?

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[Prosecutor]: Sorry, Your Honor. I am unable to locate it on the system. So if I could just stand before the jury.

THE COURT: Yes, you can approach. Hang on.

THE COURT: Ladies and gentlemen, *disregard anything that might have flashed up on the screen right then*. All right. (emphasis added).

The nature of the evidence and circumstances of Defendant's case bear similarities to both *Barts* and *Hines*, but in effect, are more easily distinguished. The circumstances are most similar to *Hines* as inadmissible evidence was inadvertently published to the jury; however, unlike the jury in *Hines*, the jury here did not face the same "impossible task" of distinguishing among forty documents and deciding what to remember and what to disregard. *Hines*, 131 N.C. App. at 462-463, 508 S.E.2d at 314. Unlike the jury in *Hines*, this jury only had to disregard one image displayed for several seconds; additionally, the trial court told them to disregard it—a possible task. The jurors could "fully understand and comply with the instructions of the court, and are presumed to have done so." *Id.* Moreover, unlike in *Hines*, we do not have a second independent piece of inadmissible evidence "inadvertently published to the jury" that lacked a limiting instruction. *Id.* Closer to *Barts*, the trial court here took "immediate . . . curative action" to quarantine all inadmissible evidence. *Barts*, 316 N.C. at 684, 343 S.E.2d at 840.

To be sure, unlike *Barts*, the trial court here did not ask and confirm whether the jury could follow its instruction. Disregarding a single image is not as indelible as disregarding a witness's testimony about multiple robbery "jobs" when told only to consider the witness's testimony about a single "job." The trial court did not abuse its discretion by issuing just a curative instruction to address any resulting prejudice to Defendant from the inadvertent showing of the picture.

Defendant also asserts "[t]he State sought to play on a racial trope in order to fill [this hole and other] holes in their case" by flashing an image "that could evoke negative racial associations in the viewer." "Whether direct racial slurs, or indirect appeals to racial prejudice, when a prosecutor seeks to invoke a jury's racial biases to obtain a conviction, such statements are improper." *State v. Copley*, 839 S.E.2d 726 (N.C. 2020) (Earls, J., concurring). However, the inadvertent display of an allegedly prejudicial desktop screen is not equivalent to a prosecutor's intentional appeal to a jury's emotions via improper and clear reference to a defendant's race. There were no arguments or references made to any aspect of this photograph either directly or indirectly by the State. We see no



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evidence to support the State having used the inadvertent display of the desktop screen to fill a hole in its case or to interject race into the trial.

Defendant also contends the nature of the photograph itself had the potential to evoke “negative racial associations” upon being viewed by the jury. We likewise see no evidence that that was the case or find the photograph to be prejudicial based on race.

After considering the nature of the evidence and the circumstances of this case, Defendant has not overcome the presumption that the jury was able to understand and comply with the trial court’s limiting instruction. It remained possible for him to receive a fair and impartial verdict. The trial court’s ruling was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. Accordingly, the trial court did not abuse its discretion.

**B. Clerical Error**

**[2]** Defendant argues the trial court imposed community punishment in accordance with N.C.G.S. § 15A-1340.17(c); thus, Defendant contends the sentence of 36 months supervised probation was erroneous under N.C.G.S. § 15A-1343.2 (d)(3). The State argues Defendant was sentenced to an intermediate punishment, in accordance with N.C.G.S. § 15A-1340.17(c), as reflected in both the sentencing hearing transcript and the judgment, and further, the box checked “community punishment” instead of “intermediate punishment” was a clerical error.

“When [we are] confronted with statutory errors regarding sentencing issues, such errors are questions of law, and as such, are reviewed *de novo*.” *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) (internal quotation marks and citations omitted). “When a defendant assigns error to the sentence imposed by the trial court our standard of review is whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing.” *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006) (citation omitted); *see* N.C.G.S. § 15A-444(a1) (2019). A clerical error is “[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination.” *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (citation omitted). “When, on appeal, a clerical error is discovered in the trial court’s judgment or order, it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth.” *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (internal quotation marks and citation omitted).

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In *Allen*, we remanded a sentencing error where the original written order indicated the defendant was sentenced to intermediate punishment, rather than community punishment. *Allen*, 249 N.C. App. at 382, 790 S.E. 2d at 592. We did so because the Record reflected the trial court and prosecutor both stated the plea agreement contained an assignment of community punishment, the trial court stated it was sentencing the defendant to community punishment and correctly stated the requirements for community punishment, the first page of the original written order assigned community punishment, and a 10-day jail sentence would be in compliance with community punishment requirements. *Allen*, 249 N.C. App. at 381-82, 790 S.E.2d at 592. A subsequent modified order was vacated because it reflected the clerical error in the original order. *Id.*

This Record reflects a similar error and we hold it was clerical. Based on his prior record level, Defendant was sentenced for a Class H felony at Level I, eligible to receive either intermediate or community punishment.<sup>1</sup> See N.C.G.S. § 15A-1340.17(c). The State requested intermediate punishment and Defendant requested community punishment.

The trial court manifested its decision for an intermediate punishment, sentencing Defendant to 36 months supervised probation<sup>2</sup> and an 89-day period of confinement, the bulk of which was to be served on weekends. The probation sentence was in excess of the community punishment maximum sentence of 30 months. N.C.G.S. § 15A-1343.2(d)(3). Defendant's sentence, an intermediate punishment, was also reflected in his judgment.

Defendant's split sentence was enumerated within the "Intermediate Punishments" section of the judgment and reflects what was specified in the sentencing hearing. By contrast, the "Community and Intermediate Probation Conditions" section has no such marks. The only indication regarding community punishment is a checkmark in the box for community punishment at the top of the judgment. When considering in total the sentencing hearing, the conditions imposed by the trial court in Defendant's presence, and the written judgment, we conclude the mark in the community punishment box was clerical error, "resulting from a minor mistake or inadvertence . . . and not from judicial reasoning or determination." *Jarman*, 140 N.C. App. at 202, 535 S.E.2d at 878. We remand to the trial court for correction.

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1. Defendant was also eligible for an active sentence. N.C.G.S. § 15A-1340.17(c).

2. The trial court pronounced Defendant's sentence of 36 months probation twice during sentencing.

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**CONCLUSION**

The trial court did not abuse its discretion by denying Defendant's motion for a mistrial. We remand for correction of a clerical error in the written judgment to be consistent with the trial court's imposed sentence.

NO ERROR IN PART; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges ZACHARY and ARROWOOD concur.

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STATE OF NORTH CAROLINA

v.

DONALD EUGENE HILTON

No. COA19-226

Filed 19 May 2020

**Satellite-Based Monitoring—lifetime—constitutional challenge—  
as-applied—during versus after post-release supervision**

A trial court's imposition of lifetime satellite-based monitoring (SBM) pursuant to N.C.G.S. § 14-208.40B was unconstitutional in part as applied to defendant (who had been convicted of multiple sex offenses). Although the particular statute relied on by the trial court only refers to SBM "for life," the Court of Appeals held that the phrase was severable and upheld the portion of the order imposing SBM during defendant's post-release supervision based on the trial court's findings, which demonstrated SBM furthered the State's interest in preventing violations of post-release supervision conditions, and because defendants under supervision have a reduced expectation of privacy. The court reversed the portion of the order imposing SBM beyond defendant's post-release supervision as constituting an unreasonable search pursuant to *State v. Grady*, 372 N.C. 509 (2019).

Judge BROOK concurring in result in part and dissenting in part.

Appeal by Defendant from order entered 10 May 2018 by Judge Daniel A. Kuehnert in Catawba County Superior Court. Heard in the Court of Appeals 18 September 2019.

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*Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for Defendant-Appellant.*

DILLON, Judge.

Donald Eugene Hilton (“Defendant”) appeals from the trial court’s order enrolling him in lifetime satellite-based monitoring (“SBM”), contending that the imposition of SBM constitutes an unreasonable search. We conclude that the imposition of SBM on Defendant *during the period of his post-release supervision* constitutes a reasonable search. However, we conclude that the imposition of SBM *thereafter* is unreasonable and remand for additional findings. Accordingly, we affirm in part, and reverse in part and remand.

### I. Background

In 2005, Defendant committed various sex crimes with a minor female. In April 2007, Defendant pleaded guilty to statutory rape and to a statutory sexual offense stemming from his 2005 conduct. He was sentenced to 144 to 182 months of imprisonment. In his sentence, he was given credit for approximately 22 months for his pre-sentence confinement, leaving a remaining sentence of approximately 122 months (or about 10 years) to 160 months (or about 13 years).

In July 2017, approximately 122 months after being sentenced, Defendant was released from prison, but subject to post-release supervision. As a condition of his post-release supervision, Defendant was ordered *not* to leave Catawba County without the consent of his probation officer.<sup>1</sup>

During his post-release supervision period, Defendant violated a post-release supervision condition by leaving Catawba County, traveling to Caldwell County, without the knowledge or approval of his probation officer. He was subsequently arrested for and charged with taking

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1. It appears from the record that Defendant was imprisoned for a total of about twelve (12) years, as he was arrested in 2005 and released in 2017. We note that the trial court, in its order imposing lifetime SBM found that Defendant “served a sentence of 15 years and two months.” However, this finding is not supported by the record and appears to be a misstatement: 15 years and two months (or 182 months) represents *the maximum* term of imprisonment Defendant was sentenced to, not the term he had actually served.

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indecent liberties with his fifteen-year-old niece, while absconding in Caldwell County.

In April 2018, following his arrest, Catawba County prosecutors noticed a hearing for the trial court to consider whether Defendant should be required to enroll in the SBM program based on his 2007 convictions, (not based on his post-conviction absconding violation). After a hearing on the matter, the trial court ordered Defendant to enroll in the SBM program for the rest of his natural life.

Defendant appeals.

## II. Jurisdiction

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2017). *See State v. Singleton*, 201 N.C. App. 620, 626, 689 S.E.2d 562, 566 (2010) (“this Court has jurisdiction to consider appeals from SBM monitoring determinations under N.C. Gen. Stat. § 14-208.40B pursuant to N.C. Gen. Stat. § 7A-27”).

## III. Standard of Review

“An appellate court reviews conclusions of law pertaining to a constitutional matter *de novo*.” *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010).

## IV. Analysis

The trial court mandated that Defendant be enrolled in *lifetime* SBM under Section 14-208.40B. N.C. Gen. Stat. § 14-208.40B (2018). Defendant makes no argument that the trial court exceeded its authority *under our General Statutes*. Indeed, the trial court acted within its *statutory* authority to impose lifetime SBM on Defendant in the callback hearing, as the trial court found that Defendant’s 2007 conviction was for an “aggravated offense.” *See* N.C. Gen. Stat. § 14-208.40B (“If the court finds that . . . the conviction offense was an aggravated offense . . . the court shall order the offender to enroll in satellite-based monitoring for life.”).

Rather, Defendant argues that the trial court exceeded its *constitutional* authority, that the imposition of lifetime SBM under Section 14-208.40B as applied in his case constitutes an unreasonable search under the Fourth Amendment of the United States Constitution.

We conclude that the imposition of lifetime SBM under Section 14-208.40B is unconstitutional as applied to this Defendant, *in part*. Specifically, we hold that the imposition of SBM *beyond* the period

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of Defendant's post-release supervision constitutes an unreasonable search. However, the imposition of SBM *during* the period of his post-release supervision is reasonable. During this period, Defendant's expectation of privacy is very low. And though the State failed to present evidence showing the efficacy of SBM in solving sex crimes, it did present evidence showing SBM's efficacy in aiding the State in determining whether Defendant is violating the condition of his post-release supervision, that he remain within Catawba County. *See, e.g., State v. Griffin*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 2020 N.C. App. LEXIS 139 at \*17 (N.C. Ct. App. Feb. 20, 2020) (recognizing that a sex-offender's rights are "appreciably diminished during his [] term of post-release supervision, that is not true for the remaining [term] of SBM imposed [after the post-release supervision terminates]").

We hold that the "for life" language contained in Section 14-208.40B is severable from the rest of that statute. It is, therefore, appropriate for us to affirm that portion of the trial court's order which imposes SBM under Section 14-208.40B for the remainder of the period that Defendant is subject to post-release supervision. Indeed, our Supreme Court has recognized that "if the invalid part [of a statute] is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out[.]" *State v. Fredell*, 283 N.C. 242, 245, 195 S.E.2d 300, 302 (1973). The Court explained that a provision is severable if the remaining provisions "are operative and sufficient to accomplish" the General Assembly's purpose in enacting the statute. *Id.* at 245, 195 S.E.2d at 302. We do not believe that it offends the General Assembly's purpose in enacting Section 208.40B if it is applied for some period less than a defendant's life. Rather, the General Assembly's purpose in enacting this Section is better served if SBM can be imposed for some period of time rather than not at all, where it has been determined that a defendant has committed an aggravated sexual offense and that the imposition for at least *some* period of time would not offend the Fourth Amendment. This situation is similar to a situation where a defendant commits a crime and is sentenced to a term that is later determined by a court to violate the Eighth Amendment's prohibition against cruel and unusual punishments. In that situation, the reviewing court does not order the defendant released, but reduces the sentence to comply with the Eighth Amendment.

## A. Reasonableness of the Search

The United States Supreme Court held that the imposition of SBM effects a continuous warrantless search. *Grady v. North Carolina*, 575 U.S. 306, 310, 191 L.Ed.2d 459, 462-63 (2015). But the Court noted that an

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SBM “search” is not necessarily unconstitutional. *Id.* at 310, 191 L.E.2d at 462-63. Rather, the imposition of SBM is unconstitutional only if it is unreasonable, and the Court held that the reasonableness of an SBM search is to be determined based on the “totality of the circumstances[.]” *Id.* at 310, 191 L.E.2d at 462-63. In considering the totality of the circumstances, the Court stated that a reviewing court is to consider, among other things, “the nature and purpose of the search” and “the extent to which the search intrudes upon reasonable expectations of privacy.” *Id.* at 310, 191 L.E.2d at 462.

In the recent seminal case on our State’s SBM program, our Supreme Court held that the imposition of SBM is unconstitutional as applied to a particular class of defendants: sexual offenders who are no longer under any form of post-release supervision, parole or probation and who meet the statutory definition of a “recidivist.” *State v. Grady*, 372 N.C. 509, 545, 831 S.E.2d 542, 568-69 (2019). Though the holding was limited to a subset of unsupervised, convicted sex offenders, the *Grady* holding appears to impose a high standard on the State to meet in order to show reasonableness when imposing SBM on *any* convicted sex offender who is not under any form of State supervision, mainly because of the high burden of showing the efficacy of SBM in helping solve future crimes.

In its analysis, though, our Supreme Court recognized that the calculus of reasonableness is different when a defendant *is* subject to State supervision. *See id.* at 526, 831 S.E.2d at 556 (differentiating its holding to cases where there is an “ongoing supervisory relationship between defendant and the State”). For instance, in the Conclusion section, the Court emphasized that its holding does not enjoin all of the SBM program’s applications, in part, “because this provision *is still enforceable* against a [sex offender] during the period of his or her State supervision[.]” *Id.* at 547, 831 S.E.2d at 570 (emphasis added).

In the present case, the trial court concluded that the imposition of SBM would be reasonable and would be so for the remainder of Defendant’s natural life. In support of its conclusion, the trial court found: that Defendant had been convicted of aggravated sexual offenses in 2007; that he was released in 2017; that he violated the terms of his post-release supervision by leaving Catawba County without notifying his parole/probation officer; that the SBM device is not overly intrusive; that the SBM device monitors Defendant’s location at all times; and that there does not currently exist any similar forms of monitoring available.<sup>2</sup>

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2. We note that the trial court also found that “the defendant admitted to sexually assaulting more than one minor child” prior to his conviction for the 2005 conduct *and*



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Based on *Grady*, we must conclude that the trial court's imposition of SBM on Defendant *for any period beyond* his period of post-release supervision is unreasonable. For the following reasons, though, we conclude that the imposition of SBM *during* Defendant's post-release supervision period is reasonable.

1. Intrusion Upon Reasonable Privacy Interests – Nature of the Privacy Interest.

As our Supreme Court instructs in *Grady*, “the first factor to be considered is . . . the scope of the legitimate expectation of privacy at issue.” *Id.* at 527, 831 S.E.2d at 557. The Court held that the defendant's expectation of privacy in *Grady* was only slightly more diminished than an average citizen's who had never committed a felony: “[E]xcept as reduced for possessing firearms and by providing certain specific information and materials to the sex offender registry, defendant's constitutional privacy rights, including his Fourth Amendment expectations of privacy, have been restored.” *Id.* at 534, 831 S.E.2d at 561. In support of that proposition, the Court recognized that the expectation of privacy for a defendant who is still under a form of State supervision is extremely low, but that one “enjoy[s] the full protection of the Fourth Amendment [once] probation ha[s] been discharged.” *Id.* at 533, 831 S.E.2d at 561 (quoting *Trask v. Franco*, 446 F.3d 1036, 1043-44 (10th Cir. 2006)).

We, therefore, conclude that Defendant's expectation of privacy is presently significantly diminished and will remain so while Defendant continues to be under post-release supervision.

2. Intrusion Upon Reasonable Privacy Expectations – Character of the Intrusion Complained of

Our Supreme Court next analyzed “the character of the intrusion” which “contemplates the ‘degree’ of and ‘manner’ in which the search intrudes upon legitimate expectations of privacy.” *Id.* at 534, 831 S.E.2d at 561.

The Court noted that the SBM device creates quite a burden on a defendant, certainly conflicting what the trial court in this case found concerning the burden of wearing an SBM device. The Court noted that

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that he is currently facing charges for taking indecent liberties with a minor for alleged conduct which occurred recently when Defendant had left Catawba County without his parole/probation officer's knowledge. However, we caution that these “findings” are not findings that Defendant actually engaged in any other inappropriate sexual behavior beyond the 2005 incidents for which he was convicted in 2007. The trial court could have expressly found, by a preponderance of the evidence, that Defendant had engaged in other acts to support a determination that he is a recidivist, but the trial court did not do so.



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the device “require[s] defendant to be tethered to a wall [each day for two hours so that the device can recharge] for what amounts to one month out of every year[.]” *Id.* at 536, 831 S.E.2d at 562-63.

While the intrusion is great, we conclude it is not as great as in *Grady* where the imposition is only for the remainder of the period that Defendant is subject to supervision.

We note our Supreme Court’s statement that the lack of judicial oversight weighed heavily against the constitutionality of lifetime SBM in *Grady*. *Id.* at 535, 831 S.E.2d at 562. The Court pointed to the fact that the SBM statutes empower the Parole Commission to terminate a monitoring requirement early. *Id.* at 535, 831 S.E.2d at 562 (citing N.C. Gen. Stat. § 14-208.43(c)). However, we also note there is nothing in Section 14-208.43 which strips a trial court of any authority to entertain a motion to terminate the monitoring in the future before Defendant’s post-release supervision period ends if it determines that the SBM “search” is no longer constitutionally reasonable. *See* N.C. Gen. Stat. § 14-208.43(d1).

### 3. Nature and Purpose of the Search

Having considered the extent of the intrusion of Defendant’s expectation of privacy, we now balance that expectation “against the extent to which the SBM program sufficiently promotes . . . legitimate governmental interests to justify the search[.]” *Id.* at 538, 831 S.E.2d at 564 (internal quotation marks omitted) (citation omitted).

In *Grady*, the Court recognized that “solving crimes” is a legitimate purpose of SBM, but that the State in that case failed to show how the SBM program is effective “in apprehending or exonerating a suspected sex offender in North Carolina, or anywhere else [and, therefore, the] State’s inability to produce evidence of the efficacy of the lifetime SBM program in advancing any of its asserted legitimate State interests weighs heavily against a conclusion of reasonableness here.” *Id.* at 543, 831 S.E.2d at 567.

In the present case, though, there is a justification for SBM during Defendant’s post-release supervision period, apart from any ability to help law enforcement determine whether Defendant is committing other *sex* crimes. SBM is effective in helping law enforcement determine whether Defendant is violating the condition of his post-release supervision that he remain in Catawba County. Indeed, the State did make an argument at the hearing regarding this efficacy in solving absconding violations and that this efficacy makes SBM reasonable during the

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period of post-release supervision.<sup>3</sup> The trial court, in its order, found that Defendant was under post-release supervision; that, as a condition, he could not leave Catawba County without permission; that he, in fact, did leave Catawba County without permission; and that the SBM device allows Defendant's probation/parole officer to detect Defendant's location at all times. We conclude that these findings are supported by the evidence presented at the hearing. We note that Defendant does not make any argument that these findings are not supported by the evidence.

It may be that the State is unable to show that the imposition of SBM is effective in solving *sex* crimes in that most *sex* crimes are committed against known victims, such that the defense is not "I wasn't there," but rather "I was there, but that did not happen." But with absconding violations, the main issue to be proved is simply whether Defendant was in a place he was not allowed to be. Therefore, we conclude that the findings in the trial court's order establish that the imposing of SBM on Defendant in this case for the remainder of his post-release supervision furthers the State's interest in "solving crimes," specifically, whether Defendant has violated a condition of his post-release supervision by absconding.

#### 4. Conclusion on Reasonableness of Search

The trial court had the statutory authority under Section 14-208.40B to impose SBM on Defendant for the rest of his life. However, this authority is curtailed by the Fourth Amendment requirement that individuals not be subject to unreasonable searches. We conclude that, based on the trial court's findings, *the extent* of the search imposed by the trial court under Section 14-208.40B was unconstitutional, but that such search is reasonable during the remainder of Defendant's post-release supervision. After this period of supervision, the imposition of SBM is no longer reasonable, as Defendant's expectation of privacy is too high and the

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3. The State argued at the hearing that "[t]he testimony, even the defendant's own evidence, would indicate that he did, in fact, leave this county, went to Caldwell County without the permission of his probation officer. The probation officer indicated that if he was subjected to satellite-based monitoring, he would have known about that." The State further argued that "I realize that the physical observation in our county, as far as supervised probation, isn't for someone to keep eyes on this defendant at all times. It's a situation where the defendant has to report. A situation where the probation officer will go to the home. It is just not feasible to have somebody sit outside his home at all times and follow him around. That is not the type of resources that we have. But, with satellite-based monitoring, in some respects, it does the same thing as that, plus a little bit further. . . . I think [SBM] is reasonable in that the testimony was not all probation officers will have access to where this defendant is located [at all times]."

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State's legitimate purpose in monitoring Defendant's location – to determine whether Defendant is absconding – is extinguished.<sup>4</sup>

## B. Facial Challenge

“A facial challenge is an attack on a statute itself as opposed to a particular application.” *Los Angeles v. Patel*, 576 U.S. 409, \_\_\_, 192 L. Ed. 2d 435, 443 (2015). In a facial challenge, “a plaintiff must establish that a law is unconstitutional in all of its applications.” *Id.* at \_\_\_, 192 L. Ed. 2d at 445 (internal quotation marks omitted) (citation omitted).

Defendant argues the State's SBM program is facially unconstitutional “because the State failed to demonstrate that SBM serves any legitimate governmental interest.” Our Supreme Court in *Grady* declined to address the facial validity of the SBM statutes, holding only that the statutes were unconstitutional *as applied* to a particular class of defendants. In doing so, our Supreme Court noted, though, “the State's asserted interests here are without question legitimate.” *Grady*, 372 N.C. at 543, 831 S.E.2d at 568.

Our earlier conclusion that the nature of the State's concern was not beyond the normal need for law enforcement does not, of course, constitute a holding that the State's interest in solving crimes and facilitating apprehension of suspects so as to protect the public from sex offenders is not compelling. Sexual offenses are among the most disturbing and damaging of all crimes, and certainly the public supports the General Assembly's efforts to ensure that victims, both past and potential, are protected from such harm.

*Id.* at 538, 831 S.E.2d at 564 (citation and internal quotation marks omitted).

The General Assembly's enactments are presumed to be constitutional. Our Supreme Court recently decided the State's interests in the SBM statute are “without question legitimate.” *Id.* at 543, 831 S.E.2d at 568. Defendant cannot show “the State failed to demonstrate that SBM serves a legitimate governmental interest.” We conclude that the SBM is facially valid, at least to the extent that it can be applied to defendants under State supervision.

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4. We note that *the Parole Commission* could have imposed SBM as a condition of post-release supervision under N.C. Gen. Stat. § 15A-1368.4(b1) (2018). However, in this case, SBM was imposed by *a trial court* in the context of a callback hearing pursuant to its authority under Section 14-208.40B.

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## C. General Warrant

Defendant argues that the imposition of SBM constitutes a general warrant, in violation of our North Carolina Constitution. We conclude, however, that the imposition of SBM on individuals who are otherwise under State post-release supervision does not violate our Constitution.

## V. Conclusion

We affirm the trial court's order to the extent that it imposes SBM on Defendant for the remainder of his post-release supervision. However, we reverse the trial court's order to the extent that the order imposes SBM *beyond* Defendant's period of post-release supervision. We remand for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judge TYSON concurs.

Judge BROOK concurs in result in part and dissents in part by separate opinion.

BROOK, Judge, concurring in the result in part and dissenting in part.

I concur in the result inasmuch as the majority reverses the order imposing SBM beyond the time Defendant is subject to post-release supervision. Otherwise, I respectfully dissent. Controlling precedent requires full reversal of the SBM order at issue.

## I. Facts

Defendant was indicted for first-degree statutory rape and first-degree statutory sexual offense on 5 July 2005. Defendant pleaded guilty to these charges on 26 April 2007 and was sentenced in the mitigated range to 144 to 182 months in prison. The court considered, as a mitigating factor, among others, that “[D]efendant was suffering from a mental condition that was insufficient to constitute a defense but significantly reduced the defendant’s culpability” and that Defendant possessed a “limited mental capacity[.]”

Defendant was released from prison on 9 July 2017 and placed on post-release supervision for a period of five years. Probation Officer Travis Osborne was assigned to supervise Defendant. Defendant began living with his sister, Kathy Owens, following his release. While on post-release supervision, in April of 2018, Defendant was charged

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in Caldwell County with taking indecent liberties with a child. The charges arose out of allegations made by Ms. Owens's minor granddaughter during an interview by a social worker and forensic interviewer. The interviewer testified that the minor alleged that Defendant "kissed her on the lips[,] [k]issed her on her forehead[,] . . . placed his hands down her . . . panties, . . . in her groin area and also her buttocks." She alleged that the conduct she described occurred at her home, which is located in Caldwell County.

Defendant was not permitted, under the conditions of his post-release supervision, to leave Catawba County. However, Ms. Owens testified that Defendant had traveled "a few times" to Caldwell County to help a family member repair a trailer. Ms. Owens testified that she was not aware of this condition of Defendant's post-release supervision, and that she believed Defendant did not know of this condition because "he has a hard time understanding and you have to talk to him in a lower level." Officer Osborne testified that Defendant signed a form acknowledging this condition of his post-release supervision.

During the pendency of Defendant's case in Caldwell County, the State initiated proceedings to enroll Defendant in SBM. A hearing was held on 19 April 2018 before the Honorable Daniel A. Kuehnert during the 16 April 2018 session of Catawba County Superior Court. The hearing was continued to 10 May 2018.

The State presented evidence regarding the operation of the device used to monitor an individual's location at the May 2018 hearing. Officer Osborne testified that the monitoring device is two inches wide and is worn on the ankle. He testified that the monitor sends a satellite signal to a private company that contracts with the State to monitor offenders, and that the device "tracks every movement they make, [and] how long they're staying in one location." He further testified that the company shares that information with the offender's supervising officer. The State offered no testimony regarding in what form or how frequently the company shares location data with a supervising officer. Officer Osborne testified that the monitor is battery-operated and must be charged "at least two hours a day" to "stay fairly charged." While the monitor is being charged, the individual wearing it must be "within a cord's length of an outlet[.]" When the device loses its charge, it makes a sound to alert the wearer that can be heard up to 100 feet away.

At the hearing, the State did not present evidence regarding when the incident in Caldwell County was alleged to have occurred, nor did the State present evidence regarding whether the incident was alleged to have occurred during Defendant's first unauthorized trip to

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Caldwell County or during a subsequent trip. The State also did not present any evidence that SBM in general effectively prevents crime or assists the State in solving crimes.

The State did present testimony about what Officer Osborne “would have done . . . would [he] have known that [Defendant] was going to Caldwell County the first time he went to Caldwell County[.]” Officer Osborne testified that he “would have notified the Parole Commission and most likely requested that he be placed on the monitoring.” He further testified that “[w]e could request a warrant for that; however, I don’t think the parole commission would have issued a warrant. That’s why we would have requested that we added the conditions of being submitted to electronic monitoring.” Counsel for the State and Officer Osborne had the following exchange:

[PROSECUTOR]: [O]f course, you don’t know which particular time he went to Caldwell County these allegations stemmed from?

[OFFICER OSBORNE]: Right.

[PROSECUTOR]: However, if he would have done it the first time, if at that time he had no contact with this girl, it was the first time he was in Caldwell County, you would have been able to stop him from going any further times?

[OFFICER OSBORNE]: Correct.

[PROSECUTOR]: And so hypothetically if the first time he went to Caldwell County he had no contact with this girl, then you possibly, if in fact an assault did occur, you might have been able to avoid that with satellite-based monitoring?

...

[OFFICER OSBORNE]: Yes.

[PROSECUTOR]: Because you would have known he was leaving Catawba County and you would have intervened early on.

[OFFICER OSBORNE]: Right.

Based on the evidence presented at the hearing, the trial court found that the offense of which Defendant was convicted in 2005 was an aggravated offense, and therefore that Defendant fell into at least one

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of the categories subject to satellite-based monitoring under N.C. Gen. Stat. § 14-208.40. The trial court made the following additional findings:

1. That the defendant admitted to sexually assaulting more than one minor child prior to being convicted of first degree rape and first degree sexual offense.
2. That the defendant served a sentence of 15 years and two months for the crimes of first degree rape and first degree sexual offense.
3. That probable cause has been found to currently charge the defendant with the crime of taking indecent liberties with a minor.
4. That the defendant was charged with this crime just a couple months after being released from custody from serving his sentence for the crimes of first degree rape and first degree sexual offense.
5. That the alleged victim in the pending charge is related to one of the victim's [sic] associated with the defendant's previous convictions of first degree rape and first degree sexual assault [sic].
6. That the defendant has been monitored by probation and parole since his release from prison on July 9, 2017.
7. That one of the conditions of defendant's post release supervision is not to leave Catawba County without the permission of his probation/parole officer.
8. That the defendant has violated this condition of post release supervision and has traveled to Caldwell County without the knowledge of probation and parole.
9. That defendant's current charge of taking indecent liberties with a minor is out of Caldwell County were [sic] the alleged victim lives.
10. That the satellite based monitoring program in Catawba County utilizes an ankle monitoring device to detect the location of one subject to satellite based monitoring through Global Positioning System.
11. That the ankle monitoring device is light weight, small in size, can be adjusted for comfort and is of little intrusion to the person wearing the device.

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12. That the monitoring of this device is done by authorized personnel from probation and parole that are assigned to monitor a particular person subject to satellite based monitoring.

13. That there are safe guards [sic] in place to protect a person subject to satellite based monitoring in the case of an emergency or malfunction of the equipment.

14. That there are no known circumstances regarding this defendant that would cause a unique concern about his ability to wear the ankle monitoring device whether it be physical health, mental health, the defendant's occupation, the defendant's leisure or otherwise.

15. That there does not currently exist any other way for probation and parole to utilize satellite based monitoring other than the current practice of using an ankle bracelet.

16. That there does not exist currently any other form of monitoring available to probation and/parole [sic] other than physical monitoring similar to what is understood as supervised probation and satellite based monitoring as described above.

Based on these findings, the trial court ordered Defendant to enroll in SBM for the remainder of his natural life.<sup>1</sup>

## II. Standard of Review

"An appellate court reviews conclusions of law pertaining to a constitutional matter *de novo*." *State v. Bowditch*, 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks and citation omitted).

## III. Legal Overview

Defendant argues that "[t]he trial court erred by ordering SBM in the absence of sufficient evidence from the State addressing why continuous GPS tracking of Mr. Hilton's every movement for life was a reasonable search under the federal and state constitutions." This constitutional

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1. Before turning to the analysis, it bears repeating that SBM was imposed in this instance solely pursuant to Article 27A of Chapter 14 of the General Statutes.



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claim is best construed as an as-applied challenge. Defendant further argues that “North Carolina’s SBM program is unconstitutional on its face because the State failed to demonstrate that SBM serves any legitimate governmental interest.”

I agree with Defendant that the State failed to meet its burden of proving that the SBM statute, as applied to Defendant, is a reasonable search under the Fourth Amendment. While there is no bright line between as-applied and facial challenges, *see State v. Grady*, 372 N.C. 509, 546, 831 S.E.2d 542, 569 (2019) (“*Grady III*”), a Court should “determine the constitutionality of a statute . . . only to the extent necessary to determine that controversy. It will not undertake to pass upon the validity of the statute as it may be applied to factual situations materially different from that before it.” *Bulova Watch Co. v. Brand Distribs. of N. Wilkesboro, Inc.*, 285 N.C. 467, 472, 206 S.E.2d 141, 145 (1974). Our Court should therefore begin the inquiry with Defendant’s as-applied challenge, which resolves the current controversy in his favor and renders consideration of his arguments as to facial unconstitutionality unnecessary.

To reach this conclusion, I first review the balancing test applicable to all Fourth Amendment controversies. I then consider how this balancing test operates in the particular case of North Carolina’s SBM regime. Applying this background to the current controversy, I balance the nature and character of lifetime SBM’s intrusion on Defendant’s Fourth Amendment rights against the State’s evidence that lifetime SBM of Defendant promotes its legitimate governmental interests. After careful consideration, I would hold that the absence of evidence supporting SBM’s efficacy in this instance means that the State cannot justify this significant lifetime intrusion on Defendant’s privacy interests.

## A. Fourth Amendment Overview

The Fourth Amendment “safeguard[s] the privacy and security of individuals against arbitrary invasions by government officials.” *Camara v. Mun. Ct. of City & Cty. of San Francisco*, 387 U.S. 523, 528, 87 S. Ct. 1727, 1730, 18 L. Ed. 2d 930, 935 (1967); *see also Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834, 16 L. Ed. 2d 908, 917 (1966) (“The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”); *Riley v. California*, 573 U.S. 373, 403, 134 S. Ct. 2473, 2494, 189 L. Ed. 2d 430, 452 (2014) (“[T]he Fourth Amendment was the founding generation’s response to the reviled ‘general warrants’ and ‘writs of assistance’ of the colonial era, which allowed British officers to rummage through homes

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in an unrestrained search for evidence of criminal activity.”). “[T]he ultimate measure of the constitutionality of a governmental search is ‘reasonableness,’ ” which we judge “by balancing [the search’s] intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests[.]” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652-53, 115 S. Ct. 2386, 2390, 132 L. Ed. 2d 564, 574 (1995) (citation omitted). When applying this balancing test in an as-applied challenge, “the determination whether a statute is unconstitutional as applied is strongly influenced by the facts in a particular case.” *State v. Packingham*, 368 N.C. 380, 393, 777 S.E.2d 738, 749 (2015), *rev’d and remanded on other grounds*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1730, 198 L.Ed. 2d 273 (2017).

**B. North Carolina’s SBM Program**

In recent years, our Courts have produced a robust jurisprudence surrounding our state’s SBM regime. I briefly review that case law below.

The United States Supreme Court held in *Grady v. North Carolina* that satellite-based monitoring of a sex offender constitutes a search and therefore must comply with the reasonableness requirement of the Fourth Amendment. 575 U.S. 306, 309, 135 S. Ct. 1368, 1370, 191 L. Ed. 2d 459, 462 (2015) (per curiam). This decision overruled *State v. Grady*, 233 N.C. App. 788, 759 S.E.2d 712, 2014 WL 1791246 (2014) (unpublished) (“*Grady I*”), which relied on the premise that constant GPS monitoring of an individual did not constitute a search within the meaning of the Fourth Amendment. *Grady*, 575 U.S. at 309, 135 S. Ct. at 1370-71. The United States Supreme Court remanded the case for our Courts to determine the reasonableness of the imposition of lifetime SBM on the *Grady* defendant. *Id.* at 311, 135 S. Ct. at 1371.

While *State v. Grady*, 259 N.C. App. 664, 817 S.E.2d 18 (2018) (“*Grady II*”), was pending on remand, this Court held in 2017 that where the State fails to bring forward sufficient evidence to establish that the imposition of lifetime SBM constitutes a reasonable search compliant with the Fourth Amendment, the State shall not be “permitted to ‘try again’ by applying for yet another [SBM] hearing . . . in the hopes of this time having gathered enough evidence.” *State v. Greene*, 255 N.C. App. 780, 784, 806 S.E.2d 343, 345 (2017).

The following year, this Court decided *Grady II*. Despite the fact that “the SBM program had been in effect for approximately ten years[,] . . . the State failed to present any evidence . . . of the general procedures used to monitor” offenders through the program or “of its efficacy in furtherance of the State’s undeniably legitimate interests.” *Grady II* at

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674-75, 817 S.E.2d at 27. Under such circumstances, the imposition of lifetime SBM on the defendant cannot constitute a reasonable search. *Id.* at 676, 817 S.E.2d at 28.

This Court then decided *State v. Griffin*, 260 N.C. App. 629, 818 S.E.2d 336 (2018) (“*Griffin I*”), holding that “unless SBM is found to be effective to actually serve the purpose of protecting against recidivism by sex offenders, it is impossible for the State to justify the intrusion of continuously tracking an offender’s location for any length of time, much less for thirty years.” *Id.* at 636, 818 S.E.2d at 341. As there was no such evidence presented, we held a trial court order requiring Defendant to enroll in long-term SBM violated the Fourth Amendment. *Id.* at 637, 818 S.E.2d at 342.

That same year, this Court held that the imposition of lifetime SBM following a defendant’s release from prison, when the order imposing lifetime SBM comes at the beginning of a lengthy sentence, is unconstitutional without “an individualized determination of reasonableness[.]” *State v. Gordon*, 261 N.C. App. 247, 261, 820 S.E.2d 339, 349 (2018) (“*Gordon I*”). Without such a showing that SBM served “the State’s purpose of deterring future sexual assaults,” the State failed to meet its burden. *Id.* at 260, 820 S.E.2d at 348.

Our Supreme Court then affirmed *Grady II* as modified in *Grady III*. 372 N.C. at 551, 831 S.E.2d at 572. The Court applied the Fourth Amendment reasonableness test to the imposition of lifetime SBM on the defendant, holding that North Carolina’s mandatory SBM statutes are unconstitutional as applied to all defendants who are subject to such monitoring based solely on their status as recidivists. *Id.* It reached this conclusion because “the State ha[d] not met its burden of establishing the reasonableness of the SBM program under the Fourth Amendment balancing test required for warrantless searches.” *Id.* at 544, 831 S.E.2d at 568. Integral to that determination was the State’s failure to make “any showing . . . that the program furthers its interest in solving [sex] crimes that have been committed, preventing the commission of sex crimes, or protecting the public.” *Id.* at 544-45, 831 S.E.2d at 568.

On the other side of the scale, *Grady III* made plain that it is difficult to overstate the intrusion on privacy interests visited upon individuals by SBM. *Grady III* instructed that SBM, which tracks the individual’s location constantly, implicates an individual’s right to be secure in his person, *id.* at 527-28, 831 S.E.2d at 557, and his house, *id.* at 528, 831 S.E.2d at 557, as well as his expectation of privacy in his “physical location and movements[.]” *id.* (citation omitted). The Court compared the

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collection of SBM data to the government's accessing cell-site location information ("CSLI") in *Carpenter v. United States*, \_\_\_ U.S. \_\_\_, 138 S. Ct. 2206, 201 L. Ed. 2d 507 (2018). *Grady III*, 372 N.C. at 528, 831 S.E.2d at 557-58. However, the Court found that "[t]he SBM program presents even greater privacy concerns than the CSLI considered in *Carpenter* [because] [w]hile a cell phone . . . is almost a feature of human anatomy, the ankle monitor becomes, in essence, a feature of human anatomy[.]" *Id.* at 529, 831 S.E.2d at 558 (internal marks and citation omitted); *see also Carpenter*, \_\_\_ U.S. at \_\_\_, 138 S. Ct. at 2218 ("[W]hen the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone's user.").<sup>2</sup> And, of course, that near perfect government surveillance never ends in the case of lifetime SBM monitoring, with no meaningful review of its ongoing need. *Grady III*, 372 N.C. at 534-35, 831 S.E.2d at 562.

Our Court then decided *State v. Anthony*, \_\_\_ N.C. App. \_\_\_, 831 S.E.2d 905 (2019). Though filed four days after *Grady III*—meaning our Court did not have the opportunity to consider the Supreme Court's guidance in rendering our decision—*Anthony* is very much of accord with the approach taken in *Grady III*. In *Anthony*, the State did argue for the efficacy of lifetime SBM based on various studies and statistics; however, it did not present the studies to the defendant, to the trial court, or include them in the record on appeal. *Id.* at \_\_\_, 831 S.E.2d at 909. The studies were thus not subject to judicial notice. *Id.* at \_\_\_, 831 S.E.2d at 909-10. Without such evidence or any other "evidence supporting the reasonableness of SBM as applied to [d]efendant," the imposition of lifetime SBM was unconstitutional. *Id.* at \_\_\_, 831 S.E.2d at 906. In balancing the State's legitimate interests against the defendant's privacy interest, our Court spoke plainly about how an absence of evidence of efficacy was fatal to the State's case:

Even if we assume sex offenders in general do have a higher rate of recidivism than those convicted of other crimes, and even if a defendant in particular has an increased likelihood of reoffending, if there is no evidence

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2. Though generally consistent with our Court's opinion in *Grady II*, the Supreme Court parted company with the opinion below in characterizing the intrusiveness of SBM. *Grady III*, 372 N.C. at 535-36, 831 S.E.2d at 562-63 ("Mr. Grady, of course, must not only wear the half-pound ankle monitor at all times and respond to any of its repeating voice messages, but he also must spend two hours of every day plugged into a wall charging the ankle monitor. We cannot agree with the Court of Appeals that these physical restrictions, which require defendant to be tethered to a wall for what amounts to one month out of every year, are 'more inconvenient than intrusive.'") (quoting *Grady II*, 372 N.C. at 672, 817 S.E.2d at 25).

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that SBM actually prevents recidivism, the State cannot show that imposing a continuous, life-time search is reasonable under the Fourth Amendment of the United States Constitution.

*Id.* at \_\_\_, 831 S.E.2d at 907.

After *Grady III*, the Supreme Court reversed those SBM orders for defendants in the same offender group as Grady and remanded to our Court those cases the outcome of which was not directly controlled by the holding in *Grady III*. See, e.g., Order, *State v. Dravis*, No. 305P18 (2019); Order, *State v. Griffin*, No. 270A18 (2019); Order, *State v. Gordon*, No. 312P18 (2019). Unsurprisingly, given the development of the case law laid out above, our Court's SBM case law has continued along this same general trajectory since our Supreme Court's decision in *Grady III*.

First, upon remand from our Supreme Court, our Court again unanimously reversed the imposition of lifetime SBM in *State v. Dravis*, \_\_\_ N.C. App. \_\_\_, 837 S.E.2d 384 (2020). Despite the fact that the defendant fell outside the offender category involved in *Grady III*, the panel held the State had not carried its burden of establishing the search was reasonable under the Fourth Amendment. *Id.* at \_\_\_, 837 S.E.2d at 385. Writing for the panel, Judge Dillon noted the “*State did not provide sufficient evidence to show how the efficacy of SBM . . . furthered a legitimate interest of the State; e.g. to help solve sex offense crimes.*” *Id.* (emphasis added).

Our Court then again reversed the imposition of lifetime SBM in *State v. Griffin*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 840 S.E.2d 267 (2020) (“*Griffin II*”), with one judge concurring in the result only. *Id.* at \_\_\_, 840 S.E.2d at 276. Our Court noted that the “[d]efendant’s circumstances place him outside of the facial aspect of *Grady III*’s holding[,]” but applied the *Grady III* reasonableness analysis, noting that, “[a]lthough *Grady III* does not compel the result we must reach in this case, its reasonableness analysis does provide us with a roadmap to get there.” *Id.* at \_\_\_, 840 S.E.2d at 273. Applying that analysis, our Court concluded that the State “fail[ed] to meet its burden [of] showing SBM’s efficacy in accomplishing the State’s professed aims” and determined the order imposing 30 years of SBM was an unreasonable warrantless search in violation of the Fourth Amendment. *Id.* at \_\_\_, 840 S.E.2d at 276.

Our Court then again reversed the imposition of lifetime SBM in *State v. Gordon*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2020 WL 1263993, at \*7 (2020) (“*Gordon II*”), with one judge concurring in the

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judgment. Applying the requisite analysis from *Grady III*, our Court concluded that the State failed to meet its burden of establishing that lifetime SBM after Defendant's eventual release from prison—some 15 to 20 years in the future—was a reasonable search. *Id.* at \*6-7. We concluded that where the State “makes no attempt to distinguish th[e] undeniably important interest [in preventing sexual assaults] from the State's normal need for law enforcement[.]” *id.* at \*6 (internal marks and citation omitted), the State fails to demonstrate “the government's need to search—i.e., the other side of the balancing test[.]” *id.* (citing *Grady III*, 372 N.C. at 527, 831 S.E.2d at 557).

Most recently, our Court invoked Rule 2 to address the merits of a defendant's appeal of the imposition of lifetime SBM in *State v. Graham*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2020 WL 1263994, at \*11 (2020), and *State v. Ricks*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_, 2020 WL 2121296, at \*7 (2020). In both cases, our Court concluded that the State failed to meet its burden of establishing the reasonableness of SBM where the trial court failed to hold a *Grady* hearing and the State failed to produce any evidence of the reasonableness of the lifetime warrantless search. *Graham*, 2020 WL 1263994, at \*12; *Ricks*, 2020 WL 2121296, at \*10. Because the requisite *Grady* hearings were not held, the orders were vacated without prejudice to the State's re-filing in the trial. *Graham*, 2020 WL 1263994, at \*12 (“[T]he State has not yet had its ‘first bite of the apple,’ and vacatur of the SBM order with remand for an evidentiary hearing consistent with the most recent guidance from our Supreme Court in *State v. Grady* is appropriate.”) (internal citation omitted); *Ricks*, 2020 WL 2121296, at \*10 (citing *State v. Bursell*, 258 N.C. App. 527, 813 S.E.2d 463 (2018), and *State v. Bursell*, 372 N.C. 196, 827 S.E.2d 302 (2019), for the proposition that vacatur with remand for hearing is the appropriate remedy where the trial court fails to hold a *Grady* hearing on the reasonableness of imposing SBM).

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“[I]t is axiomatic that ‘the sexual abuse of a child is a most serious crime and an act repugnant to the moral instincts of a decent people. And it is clear that a legislature may pass valid laws to protect children and other victims of sexual assault from abuse.’” *Grady II*, 259 N.C. App. at 675, 817 S.E.2d at 27. It is also plain from the controlling case law that in assessing the validity of SBM's imposition, we balance the extent to which SBM effectively prevents sexual abuse against its “deep . . . intrusion upon [an] individual's protected Fourth Amendment interests.” *Grady III*, 372 N.C. at 538, 831 S.E.2d at 564.

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## IV. Application

## A. Nature and Character of SBM's Intrusion on Defendant's Fourth Amendment Interests

While there is no doubt that Defendant's status as a sex offender diminishes his expectation of privacy in certain contexts, it "does not mean that the Fourth Amendment falls out of the picture entirely." *Id.* at 534, 831 S.E.2d at 561 (citation omitted). As a registered sex offender, Defendant must provide the State with certain "limited information concerning his address, employment, and appearance, in addition to his photograph and fingerprints[.]" *Id.* at 531, 831 S.E.2d at 560. But the provision of this information does not "greatly diminish [his] . . . expectation of privacy in *every context*." *Id.*, 831 S.E.2d at 559 (internal marks omitted) (emphasis added). Relatedly, there is a

substantial difference[] between, on the one hand, an individual having to register his address, photograph, and other limited details pertaining to himself and the offense or offenses for which he was convicted with the sheriff and, on the other hand, an individual being required to wear an ankle appendage, which emits repeating voice commands when the signal is lost or when the battery is low, and which requires the individual to remain plugged into a wall every day for two hours[.]

*Id.* at 536-37, 831 S.E.2d at 563.

Defendant's expectation of privacy is further diminished given that he was on post-release supervision at the time of the SBM hearing. Though those subject to State supervision have a diminished expectation of privacy, *Samson v. California*, 547 U.S. 843, 852, 126 S. Ct. 2193, 2199, 165 L. Ed. 2d 250, 259 (2006), their expectation of privacy is not a nullity, *Grady III*, 372 N.C. at 534, 831 S.E.2d at 561. Further, Defendant will not be supervised forever; thus, his current status does not mean his expectation of privacy will remain "severely diminished" throughout the course of his lifetime. *Samson*, 547 U.S. at 852, 126 S. Ct. at 2199; see *Grady III*, 372 N.C. at 555, 831 S.E.2d at 575; *Gordon I*, 261 N.C. App. at 259, 820 S.E.2d at 348 ("[T]he State's ability to establish reasonableness is [] hampered by the lack of knowledge concerning the future circumstances relevant to that analysis."). Simply put, "there is no precedent for the proposition that persons . . . who have served their sentences and whose legal rights have been restored to them . . . nevertheless have a diminished expectation of privacy in their persons and in their physical



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locations at any and all times of the day or night for the rest of their lives.” *Grady III*, 372 N.C. at 533, 831 S.E.2d at 561.

The life-long, near perfect surveillance of SBM weighs against validity in the Fourth Amendment balancing test, even when considering individuals such as Defendant who will have an undoubtedly diminished expectation of privacy for some portion of their lives.

B. State’s Evidence of SBM’s Promotion of Legitimate  
Governmental Interests

Defendant argues that “the State failed to present evidence that the SBM program is effective at preventing recidivism.” Our Court and our Supreme Court have addressed a similar dearth of evidence in, among others, *Grady III*, *Ricks*, *Gordon II*, *Graham*, *Griffin II*, *Dravis*, *Anthony*, *Gordon I*, *Griffin I*, *Grady II*, and *Greene*. In each case in which the State failed to present any evidence of the efficacy of SBM in furthering the State’s interests of protecting the public from sex offenders, and reducing recidivism, we have held the imposition of life-time or long-term SBM to be unconstitutional. *See Grady III*, 372 N.C. at 521, 831 S.E.2d at 552-53 (“[T]he State failed to present any evidence of [SBM’s] efficacy in furtherance of the State’s undeniably legitimate interests.”) (quoting *Grady II*, 259 N.C. App. at 675, 817 S.E.2d at 27); *Ricks*, 2020 WL 2121296, at \*10 (“The State presented no evidence . . . regarding the reasonableness of the search[.]”); *Gordon II*, 2020 WL 1263993, at \*6 (“[T]he State’s evidence falls short of demonstrating what Defendant’s threat of reoffending will be[.]”); *Graham*, 2020 WL 1263994, at \*12 (“[T]he State notes that it presented no . . . data on the extent to which the program advances legitimate government interests.”); *Griffin II*, \_\_\_ N.C. App. at \_\_\_, 840 S.E.2d at 276 (holding search unreasonable “given the State’s failure to meet its burden showing SBM’s efficacy in accomplishing the State’s professed aims”); *Dravis*, \_\_\_ N.C. App. at \_\_\_, 837 S.E.2d at 385 (2020) (“[T]he State did not provide sufficient evidence to show how the efficacy of SBM [] furthered a legitimate interest of the State; e.g. to help solve sex offense crimes.”); *Anthony*, \_\_\_ N.C. App. at \_\_\_, 831 S.E.2d at 907 (“[T]he State did not attempt to present any evidence or request judicial notice of any studies *regarding the actual efficacy of its SBM program in preventing recidivism.*”) (emphasis in original); *Gordon I*, 261 N.C. App. at 260, 820 S.E.2d at 348 (“[T]he State’s evidence falls short of demonstrating what Defendant’s threat of recidivating will be[.]”); *Griffin I*, 260 N.C. App. at 635, 818 S.E.2d at 340 (“[T]he State presented no evidence regarding the efficacy of the SBM program.”); *Grady II*, 259 N.C. App. at 675, 817 S.E.2d at 27 (“[T]he State



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failed to present any evidence of [the SBM program's] efficacy in furtherance of the State's undeniably legitimate interests."); *Greene*, 255 N.C. App. at 782, 806 S.E.2d at 344 (noting that the State conceded that its "evidence was insufficient to establish that the enrollment constituted a reasonable Fourth Amendment search").

Here, the trial court made no findings of fact regarding the efficacy of the program in preventing or solving sex crimes. Nor did the State present any witnesses to testify that SBM is an effective law enforcement tool. As in *Grady III*, the State here presented no data or empirical studies to show that SBM is effective at preventing recidivism or deterring sex crimes. Nor did it request that the trial court take judicial notice of any studies or reports regarding the efficacy of SBM in reducing recidivism. The State also put forth no evidence regarding general recidivism rates of sex offenders to support the reasonableness of the intrusion. Similar to the case in *Grady III*,

the State has not directed this Court to, nor are we aware of, a single instance dating back to the initial implementation of the SBM program in January 2007 in which the SBM program assisted law enforcement in apprehending or exonerating a suspected sex offender in North Carolina, or anywhere else.

372 N.C. at 542-43, 831 S.E.2d. at 567. In short, the State introduced no evidence of the SBM program's efficacy.

While the State put forth no evidence of the efficacy of SBM in general in deterring sex crimes and preventing recidivism, it did attempt to put forth evidence of the likelihood of SBM to prevent Defendant's own recidivism. It did so by attempting to illustrate how SBM *could* have prevented the conduct underlying Defendant's most recent charges. Counsel for the State asked Officer Osborne how the State might have responded to discovering through SBM that Defendant was traveling out of the county. Officer Osborne testified that he as the supervising officer could have notified the parole commission, but that the parole commission likely would not have issued a warrant. Officer Osborne testified that this is why the State would have sought to electronically monitor Defendant; however, the officer failed to explain how this would have furthered the State's interests.

The following exchange between counsel for the State and Officer Osborne captures the conjectural and conclusory nature of the State's evidence:

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[PROSECUTOR]: [O]f course, *you don't know* which particular time he went to Caldwell County these allegations stemmed from?

[OFFICER OSBORNE]: Right.

[PROSECUTOR]: However, *if he would have* done it the first time, *if* at that time he had no contact with this girl, it was the first time he was in Caldwell County, *you would have been able* to stop him from going any further times?

[OFFICER OSBORNE]: Correct.

[PROSECUTOR]: And so *hypothetically* if the first time he went to Caldwell County he had no contact with this girl, then you *possibly*, if in fact an assault did occur, you *might have been able* to avoid that with satellite-based monitoring?

...

[OFFICER OSBORNE]: Yes.

(Emphasis added.)

Even if this evidence factored into the trial court's findings in supporting lifetime SBM—which it appears to have not, given that the trial court made no findings of fact regarding this testimony—it does not provide the requisite evidence “*regarding the actual efficacy of [the State’s] SBM program in preventing recidivism.*” *Anthony*, \_\_\_ N.C. App. at \_\_\_, 831 S.E.2d at 907 (emphasis in original). Beyond the leading questions and unexplained affirmative response from Officer Osborne, the State offered no evidence for how monitoring could have prevented Defendant’s alleged assault or in what form or how frequently the State might receive Defendant’s location information. Though the State’s assertion of efficacy appears to be predicated on some State intervention, what that entails is left unexplained. This is insufficient to carry the State’s burden. *See Grady II*, 259 N.C. App. at 675, 817 S.E.2d at 27-28 (holding that the State did not meet its burden of proving the efficacy of SBM where it failed to present any evidence concerning how the procedures used to monitor offenders could protect the public).

The little evidence offered seems to undermine the conclusory assertion of efficacy rather than support it. Implicit in the above questioning is an acknowledgement that SBM could not have prevented an assault that occurred on Defendant’s first unauthorized trip to Caldwell County. And Officer Osborne testified that he did not think that the

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parole commission would have issued a warrant had the State learned of Defendant's unauthorized travel, calling into question whether subsequent trips to Caldwell County could have been prevented or would have resulted in any consequences. Further, the State presented no evidence—and the trial court made no findings—indicating SBM could have served a crime-solving purpose. Finally, no findings or evidence offer any support for the efficacy of or need for the *lifetime* monitoring imposed here.

To its credit, the majority opinion acknowledges that the State has failed here to make “any showing . . . that the program furthers its interest in solving [sex] crimes that have been committed, preventing the commission of sex crimes, or protecting the public.” *Grady III*, 372 N.C. at 545, 831 S.E.2d at 568. But the majority then asserts that “there is a justification for SBM during Defendant's post-release supervision period, apart from any ability to help law enforcement determine whether Defendant is committing other *sex* crimes. SBM is effective in helping law enforcement determine whether Defendant is violating the terms of his post-release supervision by traveling outside Catawba County without permission.” *Hilton, supra* at \_\_\_\_ (emphasis in original). This approach does not withstand scrutiny.

First, there is no support for the majority's assertion that an interest in preventing defendants from absconding has been used to or can in fact justify the State's SBM program. At oral argument before the Supreme Court in *Grady III*, the State fully embraced the justification the majority rejects today:

Q: Just so I look at this correctly, what does the State contend the *specific purpose* of this program is?

A: The *specific purpose* of this program is to allow law enforcement to be able to *investigate and quickly apprehend sex offenders* to protect the public from sex offenders.

372 N.C. at 526 n.13, 831 S.E.2d at 556 n.13 (emphasis in original). The State has taken the same tack throughout this case, again without reference to absconding; the majority does not deign to explain why its absconding argument is properly before us. *See, e.g., United States v. Sineneng-Smith*, \_\_\_\_ U.S. \_\_\_\_, \_\_\_\_, \_\_\_\_ S. Ct. \_\_\_\_, \_\_\_\_, \_\_\_\_ L. Ed. 2d \_\_\_\_, \_\_\_\_, 2020 WL 2200834, at \*3 (2020) (vacating and remanding “for an adjudication of the appeal attuned to the case shaped by the parties rather than the case designed by the appeals panel”); *State v. Hardy*, 242 N.C. App. 146, 152 n.2, 774 S.E.2d 410, 415 n.2 (2015) (treating

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as abandoned issue that neither the State nor the defendant raised on appeal) (citing N.C. R. App. 28(a)).<sup>3</sup> And, in our Court's first post-*Grady III* decision, Judge Dillon, writing for a unanimous panel, reversed an SBM order because "[t]he State did not provide sufficient evidence to show how the efficacy of SBM [] furthered a legitimate interest of the State; e.g. to help solve sex offense crimes." *Dravis*, \_\_\_ N.C. App. at \_\_\_, 837 S.E.2d at 385 (emphasis added). Not only did absconding go unmentioned in *Dravis*, but also it has not merited mention in any opinion, be it majority, concurring, concurring in the result, or dissenting, in *Grady III*, *Ricks*, *Gordon II*, *Graham*, *Griffin II*, *Dravis*, *Anthony*, *Gordon I*, *Griffin I*, *Grady II*, and *Greene*. This track record does nothing to suggest that absconding is a justification for the State's seeking to impose SBM, let alone one deemed persuasive by our Courts.

And the majority seems to know its creation only bears so much weight, acknowledging it can only justify SBM while a defendant is on post-release supervision. This, however, raises another problem: the statute through which SBM was imposed here refers only to "satellite-based monitoring *for life*." N.C. Gen. Stat. § 14-208.40B(c) (2019) (emphasis added). The majority circumvents this obstacle by rewriting the statute. It begins by rightly noting that there are occasions where our courts have recognized an invalid portion of a statute can be "stricken out" while the "constitutional [portion] may stand." *State v. Fredell*, 283 N.C. 242, 245, 195 S.E.2d 300, 302 (1973). But the majority does not merely strike through "for life" but also adds a wholly different temporal frame, "so long as the offender is on post-release supervision" or some

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3. The majority suggests that the State sought to justify the imposition of SBM via an absconding argument at the trial court; this is not so. While the State did argue that SBM would have allowed the probation officer to know if Defendant went to Caldwell County, this was not presented as an end in itself. Instead, as was also the case before our Supreme Court in *Grady III*, the State's trial court argument focused on the asserted usefulness of this information in relation to a sex crime. The pertinent quote presented by the majority in its fuller context bears this out:

The testimony, even defendant's own evidence, would indicate that he did, in fact, leave this county, went to Caldwell County without permission of his probation officer. The probation officer indicated that if he was subjected to satellite-based monitoring, he would have known about that.

I think you're right, Your Honor, we don't know *if that would have prevented this crime* or not, but the possibility is that it could have.

Even if it were true, the majority's assertion does not change the fact that the State has not argued absconding as a justification on appeal nor, as discussed below, that it has never been countenanced as an interest of sufficient weight to carry the State's burden in imposing SBM.

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equivalent, to the statute in question. As Justice Scalia correctly noted, this is not our place: “The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is [the legislature’s] province.” *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, \_\_\_ U.S. \_\_\_, \_\_\_, 135 S. Ct. 2028, 2033, 192 L. Ed. 35, 42 (2015). And the legislature already allows the State to seek to impose SBM for the duration of a defendant’s post-release supervision through a statute not employed here, N.C. Gen. Stat. § 15A-1368.4(b1)(7). *See Griffin II*, \_\_\_ N.C. App. at \_\_\_, 840 S.E.2d at 274 (“The thirty years of SBM at issue in this appeal is unrelated to the State’s post-release supervision of Defendant. . . . Defendant has not contested the imposition of SBM as a condition of post-release supervision but has instead appealed an entirely different search lasting six times the length of his supervisory relationship with the State.”). Though we may wish SBM had been imposed as a condition of post-release supervision, we cannot change the fact that it was instead imposed for life by rewriting N.C. Gen. Stat. § 14-208.40B(c) to produce the desired result.

The trial court did not find and the record provides no basis for concluding SBM would have advanced the State’s undoubtedly legitimate interests here. Our courts have long required something more concrete than the conjectural and conclusory testimony proffered here by the State to justify the intrusion of warrantless SBM. *See Griffin I*, 260 N.C. App. at 635, 818 S.E.2d at 341 (holding the State cannot meet its burden of proof with a “lack of data, social science or scientific research, legislative findings, or other empirical evidence” by instead “appeal[ing] to anecdotal case law, as well as to logic and common sense”) (internal marks and citation omitted); *Anthony*, \_\_\_ N.C. App. at \_\_\_, 831 S.E.2d at 910 (holding imposition unconstitutional where “State presented no evidence regarding the *efficacy* of SBM”) (emphasis in original). The State’s failure to carry its burden necessitates reversal of the trial court’s SBM order here. *Greene*, 255 N.C. App. at 784, 806 S.E.2d at 345 (reversing SBM order because, where the State has failed to meet its burden of proving reasonableness in a *Grady* hearing, it is not permitted to “try again” in a new hearing).

## V. Conclusion

Our binding precedent is clear: the Fourth Amendment protects an individual’s reasonable expectations of privacy. Reasonableness turns on balancing a search’s promotion of legitimate governmental interests against its intrusion. “We cannot simply assume that the program serves its goals and purposes” in weighing the State’s interests. *Grady III*, 372

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N.C. at 544, 831 S.E.2d at 568. And here the State failed to bring forward any evidence that SBM would serve its stated purpose of protecting the public. On the other side of the scale, *Grady III*, as well as its many predecessor and successor cases, establish that “[t]he SBM program constitutes a substantial intrusion into [protected] privacy interests[.]” *Id.* at 544-45, 831 S.E.2d at 568. While diminished for a time in the case of individuals like Defendant, these interests are never a nullity.

I respectfully concur in the result in part and dissent in part.

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STATE OF NORTH CAROLINA  
v.  
JUSTIN LAVONE LYNCH, DEFENDANT

No. COA19-358

Filed 19 May 2020

**Confessions and Incriminating Statements—confession of guilt—voluntariness—hope for a lesser sentence—induced by officers’ statements**

In a prosecution for murder and other charges arising from a bar robbery, the trial court erred by admitting defendant’s confession of guilt where, under the totality of the circumstances, the officers who interrogated defendant induced him to confess by making statements producing a hope of a lesser sentence, thereby rendering the confession involuntary. Specifically, defendant adamantly denied any involvement in the robbery for most of the interrogation and confessed only after the officers promised (without any prompting on his part) to testify on his behalf and ask the judge to show leniency in sentencing. Further, because there were no positive witness identifications or physical evidence linking defendant to the crime, the court’s error was not harmless beyond a reasonable doubt.

Appeal by Defendant from judgment entered 19 March 2018 by Judge Charles Henry in Lenoir County Superior Court. Heard in the Court of Appeals 18 March 2020.

*Attorney General Joshua H. Stein by Assistant Attorney General Sherri H. Lawrence, for the State.*

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*Glover & Petersen, P.A., by James R. Glover, for Defendant-Appellant.*

DILLON, Judge.

Defendant Justin Lynch appeals from a judgment entered against him for first-degree murder, robbery with a dangerous weapon, and assault with a deadly weapon with the intent to kill inflicting serious injury. Defendant was sentenced to life without parole for the murder conviction and to shorter terms for the other convictions.

**I. Background**

This case arises out of the robbery of a bar on 22 January 2016, perpetrated by two masked individuals. The evidence at trial tended to show that Defendant was one of the masked individuals. During the robbery, Defendant shot and killed the owner of the bar, and he and his accomplice fled with the cash register. Officers tracked down Defendant and his accomplice and arrested them. Defendant was advised of his Miranda rights and signed a waiver, never asking to speak with a lawyer. Defendant was interrogated alone by two officers at the police station.

Defendant adamantly denied any involvement during much of the interrogation. However, towards the end of the recorded, three-hour interrogation, Defendant finally confessed to his involvement.

Prior to trial, Defendant moved to have his confession suppressed. His motion was denied.

At trial, the State introduced Defendant's confession and the testimonies of others involved in the robbery implicating Defendant. The jury convicted Defendant. Defendant appeals.

**II. Analysis****A. Voluntariness of Defendant's Confession**

On appeal, Defendant argues that it was error for the trial court to admit his confession. He contends that his confession was not voluntary "because it was produced by the hope for a sentence less tha[n] life imprisonment [in]duced by the statements and actions of the officers who interrogated him."

The transcript from the interrogation tends to show that Defendant was not predisposed to confess; he repeatedly denied any involvement; he was predisposed to believe that he would receive a life sentence whether he confessed or not; the interrogators told Defendant that they



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had overwhelming evidence of his guilt; they told him that they believed he was lying; they told Defendant that he had a better chance of a lesser sentence if he cooperated with them; and Defendant eventually cooperated, confessing to his involvement and naming his accomplice, believing that by cooperating, he had a better chance of a reduced sentence.

1. A confession induced by hope may be involuntary, depending on the totality of the circumstances.

“It has been the law of this State from its beginning that an extrajudicial confession of guilt by an accused is admissible against him *only when it is voluntary*.” *State v. Fox*, 274 N.C. 277, 292, 163 S.E.2d 492, 502 (1968) (emphasis added) (citations omitted). In an opinion penned during the first decade of our Supreme Court’s existence, our original three justices each expressed the view that a confession which was induced by some promise or hope is involuntary and, therefore, inadmissible.<sup>1</sup> *State v. Roberts*, 12 N.C. 259, 260 (1827) (granting a new trial).

We stress, though, that a confession motivated by some *hope* of leniency, in and of itself, does not render a confession involuntary. Indeed, hope may be part of a defendant’s calculus in *voluntarily* deciding to confess.

It is when this hope develops from something said by one in authority, such as by an interrogating officer, that our Supreme Court has held that a confession *may* be deemed involuntary. But even hope so derived is not *per se* involuntary. Rather, the court “looks at the totality of the circumstances.” *State v. Jackson*, 308 N.C. 549, 581, 304 S.E.2d 134,152 (1983). And where a “defendant’s will [i]s not overborne [by the hope],” his confession can still be said to be “made freely and voluntarily with full knowledge of the consequences.” *State v. Richardson*, 316 N.C. 594, 604, 342 S.E.2d 823, 831 (1986) (requiring the reviewing court to look

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1. Our first Chief Justice John Louis Taylor, our only foreign-born Chief Justice (born in London), stated: “The true rule is, that a confession cannot be received in evidence, where the Defendant has been influenced by any threat or promise[.]” *State v. Roberts*, 12 N.C. 259, 260 (1827).

Justice John Hall stated: “In order to make the confessions of a prisoner evidence to a Jury, it should appear that he was not induced to make them from a hope of favor, or compelled by fear of injury.” *Id.* at 260-61.

Justice Leonard Henderson, for whom the town of Henderson is named, stated: “Confessions are either voluntary or involuntary. They are called voluntary, when made neither under the influence of hope or fear. . . . [I]t is said, and said with truth, that confessions induced by hope . . . are, of all kinds of evidence, the least to be relied on, and are therefore entirely to be rejected.” *Id.* at 261-62.



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at the totality of the circumstances to determine whether a confession induced, in part, by hope is voluntary).

In any event, it is the role of the trial judge, and the appellate judges on review, to consider the totality of the circumstances in determining whether a confession was so induced by hope so as to render it involuntary.

2. Where there are no disputes as to what occurred during the interrogation, we review *de novo* whether Defendant's confession was voluntary.

It is the role of the trial court to resolve disputes about what was *said or done* by the defendant or the investigating officers during an interrogation. See *Richardson*, 316 N.C. at 600-01, 342 S.E.2d at 828 (1986). However, where there is no dispute or after the trial court has resolved such disputes, whether a defendant's confession was voluntary "is a question of law and is fully reviewable on appeal." *State v. Barden*, 356 N.C. 316, 339, 572 S.E.2d 108, 124 (2002) (internal quotation marks omitted) (citation omitted). That is, whether certain conduct and language by the interrogating officers "amounted to such threats or promises or influenced the defendant by hope and fear as to render [his] subsequent confession involuntary" is reviewed *de novo* on appeal, as a question of law. *Richardson*, at 601, 342 S.E.2d at 828; see *State v. Rook*, 304 N.C. 201, 216, 283 S.E.2d 732, 742 (1981) (holding that where a defendant is influenced by hope and fear the subsequent confession is involuntary); see also *State v. Andrew*, 61 N.C. 205, 206 (1867) ("What facts amount to such threats or promises as make confessions not voluntary and admissible in evidence is a question of law, and the decision of the judge in the court below can be reviewed by this court[.]").

3. Our Supreme Court has instructed that, though certain statements by interrogators are inappropriate, the determination of voluntariness must be based on the totality of the circumstances.

Confessions induced by hope or fear tend not to be reliably true, as there is some probability that the suspect decided to confess to something that he did not do simply because he believed it to be his best option at the time. Indeed, this was one of Justice Henderson's concerns in *Roberts*. *Roberts*, 12 N.C. at 262.

There is, however, a greater concern, a constitutional concern: no matter how truthful a confession may appear to be on its face, a defendant has the constitutional right not to have incriminating statements, involuntarily made by him, used against him. See *Bram v. United States*,

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168 U.S. 532, 542, 42 L.Ed. 568, 573 (1897) (“In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by [the] [F]ifth [A]mendment[.]). Therefore, the issue is *not* how truthful Defendant’s confession may otherwise appear to be. Rather, our task is to determine, based on the totality of circumstances, whether Defendant’s confession was voluntary.

As the issue before us is largely a question of law, we are bound by jurisprudence from our Supreme Court in determining whether Defendant’s confession was voluntary. Our Supreme Court has decided a number of cases during its 200-year history where an issue was the voluntariness of a confession. The line between voluntary and involuntary may appear blurred at times, as certain statements by officers are sometimes held to be sufficient to render a confession involuntary, while similar statements in other cases have been held *not* sufficient. But a closer look at these cases reveals that our Supreme Court decides each case based on the totality of the circumstances.

Our Supreme Court has held that “a confession obtained as a result of an inducement of hope promising relief from the criminal charge to which the confession relates is involuntary and inadmissible.” *State v. Hayes*, 314 N.C. 460, 476, 334 S.E.2d 741, 750-51 (1985). But the Court always looks at the totality of the circumstances to discern whether the confession was actually induced by the promise of a chance for leniency.

In *Hayes*, for example, our Supreme Court suggested a statement to the defendant that “it could possibly be of some help if he talked” was inappropriate. *Id.* at 476, 334 S.E.2d at 750. However, the Court concluded that since the statement was the only inappropriate one made and since the other circumstances suggested that it did not cause the defendant to confess, the confession was voluntary: “We conclude, however, that this [singular] statement by Captain Roberts could not have aroused in the defendant, a man 28 years old with experience dealing with law enforcement officials, any reasonable hope of reward if he confessed to the crimes.” *Id.* at 476, 334 S.E.2d at 751.

Likewise, in *State v. Corley*, our Supreme Court held that a statement by an interrogator to the defendant “that things would go better with him if he told the truth,” though inappropriate, was not enough to render the defendant’s confession involuntary:

At no time during the defendant’s testimony [during *voir dire* on the motion to suppress] did he say that any statement to him by [the officer] . . . caused him to hope to gain in any way by confessing to the crimes under investigation.

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...

The totality of the circumstances clearly compelled the trial court's determination that the defendant's statements were not induced by any hope or fear arising from the conduct of the officers and, therefore, were voluntary.

310 N.C. 40, 52-53, 311 S.E.2d 540, 547-48 (1984).

However, our Supreme Court has held on many occasions that a single suggestion by an interrogating officer may be enough to render a defendant's confession involuntary, suggesting that reviewing courts *should err on the side of the defendant*:

The assertion of his innocence, in reply to the proposition that he should confess and thus make it easier for him, does not at all prove that the offer of benefit from the officer who had him in charge did not find a lodgment in his mind. If so, what could be more reasonable than that when he found himself on the way to prison in charge of the author of this hope that a confession would alleviate his condition, he should be tempted to act then upon a suggestion that he had rejected when the prospect did not seem to him so dark, and make a confession. It [m]ay have proceeded from this cause, from this hope so held out to him. If it may have proceeded from that cause, there is no guaranty of its truth, and it must be rejected.

*State v. Pruitt*, 286 N.C. 442, 457, 212 S.E.2d 92, 102 (1975) (quoting *State v. Drake*, 113 N.C. 625, 18 S.E. 166 (1893)). For instance, in *State v. Fuqua*, our Supreme Court held that merely telling the defendant "[t]hat if he wanted to talk to me then I would be able to testify that he talked to me and was cooperative[.]" was enough to render a confession involuntary as it was made "by a person in authority . . . which gave defendant a hope for lighter punishment." 269 N.C. 223, 228, 152 S.E.2d 68, 72 (1967). In considering the totality of the circumstances, the Court noted that the statement of hope was made "before the defendant made his confession." *Id.* at 228, 152 S.E.2d at 72.

In *State v. McCullers*, though, our Supreme Court held that more egregious statements by an interrogator to a defendant did *not* render his confession involuntary, based on the totality of the circumstances, essentially because they were made after the defendant admitted to being involved in the crime. 341 N.C. 19, 460 S.E.2d 163 (1995). In that case, *after* the defendant admitted to being at the location of a killing and named his accomplices, the interrogator, in trying to get the

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defendant to implicate himself further, had the following exchange with the defendant:

[Officer] You are going to jail. . . . You are gonna be charged with murder. What's gonna be to your favor is for you to tell the truth and that's all we want is the truth.

[Defendant] So you're saying either way, I'm going to jail?

. . .

[Officer] Listen to me. Don't you think a Judge, a jury and society will look upon you much better, if you say, I didn't mean to kill the man, I didn't know he was gonna die, than [for] you to sit there and keep denying that you done it, when I've got all these other witnesses that say you did. Which way looks the best for you?

*Id.* at 23, 460 S.E.2d at 165. The Court held that the evidence showed that the defendant had already admitted to traveling to Raleigh with others and robbing a victim and hitting the victim with a bat *before* the officer made the above statements, The Court ultimately concluded that “[u]nder the totality of the circumstances test, the isolated statements [above] do not support defendant’s contention that his statements were made involuntarily out of fear or hope[.]” *Id.* at 28, 460 S.E.2d at 168.

Our Supreme Court has suggested that any statement tending to produce hope does not tilt the scales where the statement does not directly reference hope concerning the criminal charges that the defendant is currently facing. *See State v. Gainey*, 355 N.C. 73, 84, 558 S.E.2d 463, 471 (2002) (“This Court has held that an improper inducement must promise relief from the criminal charge to which the confession relates, and not merely provide the defendant with a collateral advantage.”). In *Gainey*, the Court held that a statement to the defendant that “[i]f he wanted to help himself that he could help himself by cooperating[.]” was not sufficient to render a confession involuntary in that case as the officer “never made any promises to defendant concerning the disposition of his case.” *Id.* at 84, 558 S.E.2d at 471.

We note that an admonition by interrogators to “tell the truth” is typically acceptable, while an admonition to “confess guilt” tilts towards concluding a confession was involuntary. *See, e.g., State v. Dishman*, 249 N.C. 759, 763, 107 S.E.2d 750, 753 (1959) (Parker, J., concurring).

One final point, our Supreme Court has instructed that hope induced by interrogators is less egregious when the statements are made *in response to* a solicitation by the accused, as the totality of the

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circumstances suggest that the accused is voluntarily bargaining with his interrogators in exchange for a confession rather than interrogators trying to induce a confession from a defendant predisposed not to confess. See *State v. Smith*, 328 N.C. 99, 118, 400 S.E.2d 712, 722 (1991). Though *Smith* involved some statements by the interrogator that seem to cross the line, the Court held that the resulting confession was voluntary, as the interrogator's statements were in response to the defendant's inquiry and the defendant had "significant experience" with being interrogated:

Defendant had significant experience with the criminal justice system, and it appears that the officers did little if anything to instill fear into him.

This case is more like *State v. Richardson*, 316 N.C. 594, 342 S.E.2d 823. In *Richardson* defendant's confession came as a result of bargaining with police officers. Thus, the promises made did not render his confession involuntary because "[p]romises or other statements indicating to an accused that he will receive some benefit if he confesses do not render his confession involuntary when made in response to a solicitation by the accused." *Id.* at 604, 342 S.E.2d at 831. In the present case, defendant testified that Sheriff Hardy asked where the "gun and stuff was at." Defendant asked why he should tell, and Sheriff Hardy responded that defendant could get the electric chair. Thus, according to defendant's own testimony, any benefits that Sheriff Hardy mentioned were in response to defendant's own inquiry.

*Id.* at 118, 400 S.E.2d at 722.

4. Based on the totality of the circumstances, we conclude that Defendant's confession was involuntary, based on our close examination of our Supreme Court's jurisprudence.

We have thoroughly reviewed the 42-page transcript from the interrogation of Defendant and conclude that his confession was involuntary, and therefore should have been excluded. The transcript tends to show that the following occurred during the interrogation:

Defendant was 18 years old at the time. A short time after the robbery and shooting, Defendant was apprehended and brought into custody. He arrived at the police station at around 6:30 in the evening, where he was handcuffed and placed alone in a room, separated from

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his alleged accomplice who was also apprehended. At some point he was read his Miranda rights and did not ask for an attorney. Over six hours later, at 12:46 a.m., two interrogators entered his room, they uncuff him, and they proceeded to interrogate him. Defendant consented to the interrogation.

He confessed to stealing some items from some homes. The investigators then focused on the events in the bar where the shooting occurred and the cash register was stolen. Defendant denied any involvement.

Without any prompting from Defendant, investigators told Defendant that they already knew the truth and that Defendant needed to be honest. They accused Defendant of lying.

Without any prompting from Defendant, they suggested that Defendant's shooting of the bar owner was a mistake, to which Defendant continued to simply deny any involvement.

Without any prompting from Defendant, they told Defendant that "we know who your accomplice is that went with you" and that "multiple times [you two] actually rode by [the bar] saying you want[ed] to hit that place[.]" Defendant simply denied it: "Y'all got the wrong information cause I didn't . . . I have nothing to do with it."

Without any prompting from Defendant, investigators then appealed to Defendant's belief in God to tell the truth:

"How would God feel knowing what you know, what I know . . . How would you think God feels knowing what we all know happened and you're sitting there looking at me in the face telling me that you didn't have nothing to do with it?"

Defendant, though, continued to *repeatedly* deny any involvement, saying he was at home.

In response, and without any prompting from Defendant, they told him to be honest so that they could "help" him and so that "the judge" would see him as an honest man rather than as a gang member:

"Well, the thing that I'm thinking about is knowing what we know and you've got to understand and know some of the things we [already] know. If you choose to stay on the path that you're on right now which is just not saying anything except that you were home which we know is not true, then there is not going to be a lot of room for any kind of help. . . .

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The issue is, is you're going to find yourself in court and they're going to ask what did you do that says you are the truthful man that you claim to be [rather than simply a gang member]. . . .

[I]f you stand in front of the judge and [deny involvement], . . . [h]e's not going to have any choice by to judge you by what he sees and what we show him. I want you to take the opportunity to let him see that you are not defined by that gang. . . . I believe that there is that good upstanding God fearing person in you[.] . . . Let that be who the judge sees. Let that [honest man in you] be who he decides what's going to happen."

Defendant, though, continued to deny involvement: "I don't know what you want out of me, man. I can't tell you nothing I don't know."

They told him that they would have the evidence to convict him anyway: "There's another person involved. We'll talk to that person. And that person will tell us. We got evidence that can lead back to you. It's just a matter of time. We send it. They test it. They tell us. You said you already got a felony. Right?" Defendant simply responded that he does have a felony in his record.

Then, without any prompting from Defendant, the interrogators suggested that if he was not honest, then he would lose a benefit before the judge:

"Then those kind[s] of things that would benefit you for the judge to hear [i.e., his confession/remorse] will go away."

The interrogators again appealed to Defendant's belief in God and to his grandmother's belief in God to tell the truth, and told Defendant that it was up to him to get "[a]ll the benefit you can get." They appealed to his relationship with his grandmother and to God, and then stated that it was up to him "to get it." Defendant then asked them: "Want me to get what?" An interrogator answered: "All the benefit that you can get [by confessing]," and then described this benefit as being a life with a clean conscience and a right relationship with his grandmother.

But without any further inquiry by Defendant, the *other* interrogator interjected "[w]e can let the district attorney, you know, here and show that you were very, being very cooperative on everything . . . . You've got to trust us to know that we can help you." But Defendant responded by continuing to deny any involvement in the shooting.

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Then an interrogator, unprompted, said, “Don’t miss this man, Please,” to which Defendant responded, “Miss what? What . . . am I missing?” Defendant said that he was not going to throw his life away by confessing to something he did not do. But the interrogators responded that they “[knew] what you did [and] who all was involved. We know exactly what happened.”

Defendant, though, again denied any involvement. They responded by telling him that they did not believe him. They informed Defendant that “we got multiple statements from people who said [after the incident] that you made the statement yourself several times that you did not want to kill that guy [during the robbery].” But Defendant maintained his innocence: “No, I know . . . well I didn’t do that. . . . You can’t have evidence.” An interrogator responded, “Oh, I got evidence bo.”

The interrogators described evidence that they had. And without any prompting from Defendant, an interrogator promised that if Defendant confessed, they would ask the judge to “be lenient because he was truthful.”

We pause to note that the trial court made a finding that Defendant asked the interrogators if he would be shown leniency if he confessed, suggesting that they were simply responding to his question. Specifically, the trial court found that Defendant stated, “So listen, can you just break something down for me clear. No sugar coating . . . . So what, like, all right, so explain this opportunity that I’m missing right now.” However, Defendant did not make this statement until immediately *after* the interrogator made the unprompted promise that they would ask the judge to be lenient if he confessed.

After some back and forth, Defendant stated that he would be locked up for the rest of his life, no matter what he did, because of the overwhelming evidence they said they had against him. They responded (appropriately) that his life, though, would be easier. He asked, “how [would that] make it easier for my life?” They responded, “One, the judge has the opportunity to make it easier on your sentence.” The interrogators stated that they could not promise what the judge would actually do. But then they described how they wanted the judge to view the Defendant as an honest, remorseful person and that they would vouch for him in court. They described that his honesty would be a “mitigating factor.”

Defendant still asserted his belief that he would get life imprisonment. An interrogator responded by confessing that he could not promise anything but that “[w]hat I can promise you is that you stand a better



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chance of not getting life by being truthful and remorseful, all right.” Defendant said that he understood.

It is at this point, about two hours into the interrogation, that Defendant offered to tell of his involvement but stated that he did not want to name his accomplice for fear of becoming a target if he was ever released. He described his involvement. He said that he did not want to name his accomplice because his accomplice would find out, but that the investigators should be able to figure it out. However, they pressed him “to tell everything he [knew] to save his life.” He proceeded to describe the robbery/shooting in great detail and how he and his accomplice disposed of evidence, but without ever naming his accomplice.

The interrogators suggested to Defendant that he needed to confirm the identity of his accomplice for them to be able to say that he was fully cooperative. He eventually named his accomplice. The interrogation ended, and Defendant wrote a letter of apology showing his remorse to the victim’s family.

In sum, it is obvious that Defendant was predisposed to deny involvement, as he denied any involvement dozens of times. It is obvious that Defendant believed that he would receive a life sentence whether he confessed or not. And it is obvious that, without first being prompted by a question from Defendant, the interrogators: introduced the idea into the interrogation that they had ample evidence against Defendant, that they knew he was lying, that the judge could be influenced to show him leniency in sentencing if he confessed his guilt, and that they would be willing to testify on his behalf. Accordingly, based on the totality of the circumstances, we must conclude that Defendant’s confession was involuntary. As such, the trial court erred in denying Defendant’s motion to suppress.

**B. Prejudice to Defendant**

The error in allowing Defendant’s confession into evidence constitutes a constitutional error. We conclude that the State failed to meet its burden of showing that this constitutional error was harmless beyond a reasonable doubt, as is the State’s burden on appeal. *See* N.C. Gen. Stat. § 15A-1443(b) (2016). There was sufficient evidence to convict Defendant aside from Defendant’s confession. This evidence consisted of testimony from Defendant’s accomplice and two others also involved in the robbery, as well as video surveillance footage showing the masked individuals perpetrating the crimes. It may be that a jury would have convicted Defendant anyway.

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There was, however, no physical evidence linking Defendant to the crime, and none of the witnesses at the bar could positively identify Defendant as one of the perpetrators. Defendant's confession was quite damning to his case, essentially confessing to fatally shooting the owner of the bar during a robbery. We cannot say beyond a reasonable doubt that all twelve jurors would have voted to convict Defendant if his confession was not offered into evidence. Alternatively, even under a prejudicial error review, we conclude Defendant is entitled to a new trial. It is certainly reasonably possible that at least one juror would have had reasonable doubt of Defendant's guilt, but for the admission of his confession. Accordingly, we conclude that Defendant is entitled to a new trial.

**III. Conclusion**

Based on our Supreme Court's jurisprudence, we conclude that Defendant's confession in this case was not voluntarily made. We have considered the totality of the circumstances surrounding Defendant's confession and must conclude that the confession was induced by hope instilled by the interrogators. We further conclude that the admission of Defendant's extrajudicial confession constituted reversible error.

**NEW TRIAL.**

Judges COLLINS and BROOK concur.

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STATE OF NORTH CAROLINA

v.

MARC PETERSON OLDROYD, DEFENDANT

No. COA19-595

Filed 19 May 2020

**1. Indictment and Information—fatally defective indictment—attempted armed robbery—names of victims**

An indictment for attempted armed robbery was fatally defective where it did not specifically name the victims but instead named “employees of the Huddle House located at 1538 NC Highway 67 Jonesville, NC” as victims.

**2. Criminal Law—plea bargain for multiple crimes—judgment for one crime vacated—entire plea vacated**

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Where defendant pleaded guilty to second-degree murder, attempted armed robbery, and conspiracy to commit armed robbery pursuant to a plea agreement, the entire plea was vacated and the matter remanded to the trial court for further proceedings after the Court of Appeals vacated the judgment for attempted armed robbery due to a fatal defect in the indictment.

Judge BRYANT dissenting.

Appeal by Defendant from order entered 9 March 2017 by Judge Michael D. Duncan in Yadkin County Superior Court. Heard in the Court of Appeals 3 March 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Sherri H. Lawrence, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for defendant-appellant.*

MURPHY, Judge.

Indictments must state all essential and necessary elements of an offense in order to bestow the trial court with jurisdiction. Armed robbery is a statutory enhancement of the common law offense of robbery, and under the common law robbery is a crime against the person. Indictments for crimes against the person must specifically state the name of the victim. As a result, an indictment for attempted armed robbery must name the victim, and failure to do so renders the indictment fatally defective. Where an indictment for attempted armed robbery is fatally defective for failing to name any victim, we must vacate the judgment based upon that indictment. Further, where part of a plea agreement is repudiated, the entirety of the plea must be vacated.

Here, pursuant to a plea agreement, Defendant entered a guilty plea to a reduced charge of second-degree murder, attempted armed robbery, and conspiracy to commit armed robbery for which he received a consolidated sentence of 120 to 153 months. Defendant later claimed, in his *Motion for Appropriate Relief*, that the indictment for attempted armed robbery was fatally defective in failing to name any victim. The trial court entered an order denying this claim, which we now reverse. Defendant's indictment for attempted armed robbery must have named a victim and was fatally defective in not doing so. We vacate the judgment

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for attempted armed robbery based on this indictment. Additionally, because the judgment entered on attempted armed robbery was pursuant to a plea agreement with the State, we vacate the entirety of the underlying plea agreement and remand to the trial court for further proceedings.

**BACKGROUND**

On 5 October 1996, Defendant, Marc Peterson Oldroyd, along with Brian Whitaker (“Whitaker”) and Scott Sica (“Sica”), planned to rob a Huddle House in Jonesville, using two weapons, a .9mm Beretta and a .357 Magnum. Whitaker and Sica used a stolen truck for the robbery while Defendant was waiting in a separate get-away vehicle owned by Whitaker. Whitaker and Sica drove the stolen truck to the back entrance of the Huddle House and Sica, armed with a .9mm Beretta, attempted to enter via the back entrance. This entrance was locked so Whitaker and Sica left. At the time of Sica’s attempted entrance, Defendant was in an adjacent parking lot where he could see Whitaker and Sica. Shortly after leaving, a police officer stopped Whitaker and Sica’s vehicle on the highway, asked them to step out of the car, and was given permission to search the vehicle.

While Whitaker and Sica were pulled over, Defendant drove by them and circled back around. When it became clear the police officer was going to find the materials they planned to use for the robbery, Sica shot and killed the police officer. Defendant again drove by the location and saw there were now four police cars where Whitaker and Sica had been pulled over and Whitaker and Sica’s vehicle was no longer there. Defendant then drove to a relative’s apartment where Whitaker and Sica later joined him.

Sixteen years later, Defendant was indicted for first-degree murder, attempted armed robbery, and conspiracy to commit armed robbery. The indictment for attempted armed robbery with a dangerous weapon stated:

The jurors for the State upon their oath present that on or about [5 October 1996] and in [Yadkin County] [Defendant] unlawfully, willfully and feloniously did attempt to steal, take and carry away another’s personal property, United States currency, from the person and presence of employees of the Huddle House located at 1538 NC Highway 67, Jonesville, North Carolina. [Defendant] committed this act by having in possession and with the use and threatened use of a firearm, a 9mm handgun, whereby the life

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[sic] of the Huddle House employees was [sic] threatened and endangered.

On 2 June 2014, pursuant to a plea agreement with the State, Defendant pleaded guilty to a reduced charge of second-degree murder, attempted armed robbery, and conspiracy to commit armed robbery. Pursuant to the plea agreement, all three convictions were consolidated and Defendant was sentenced to an active term of 120 to 153 months.

On 9 June 2015, Defendant filed a motion for appropriate relief (“MAR”) in which he argued, *inter alia*, that the indictment for attempted armed robbery with a dangerous weapon was “fatally flawed in that it does not name a victim.” Defendant argued this flaw meant “the State failed to establish subject matter jurisdiction over all counts. If the court has no jurisdiction over the subject matter of the action, the judgment in the action is void.” On 9 March 2017, the trial court found “as a matter of law there [were] no fatal defects in the indictments” and denied the MAR. On 26 November 2018, Defendant filed a petition for writ of certiorari requesting our review of the trial court’s denial of his MAR. The State did not file a response. A panel of this Court issued a writ of certiorari for the limited “purpose of reviewing the conclusion [in the order denying Defendant’s MAR] that ‘there are no fatal defects in [Defendant’s] indictments’ in the order of [the trial court] entered 9 March 2017.”

**ANALYSIS****A. Standard of Review**

“When a trial court’s findings on a motion for appropriate relief are reviewed, these findings [of fact] are binding if they are supported by competent evidence and may be disturbed only upon a showing of manifest abuse of discretion. However, the trial court’s conclusions [of law] are fully reviewable on appeal.” *State v. Lutz*, 177 N.C. App. 140, 142, 628 S.E.2d 34, 35 (2006) (quoting *State v. Wilkins*, 131 N.C. App. 220, 223, 506 S.E.2d 274, 276 (1998)). We apply the law governing indictments to Defendant’s indictment for attempted armed robbery “anew and freely substitute[] [our] own judgment for that of the lower tribunal.” *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (internal marks omitted).

Defendant argues the indictment for attempted armed robbery was defective and the trial court had no jurisdiction to enter the plea for this offense. “[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that

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indictment may be made at any time, even if it was not contested in the trial court.” *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341. “The sufficiency of an indictment is a question of law reviewed de novo.” *State v. White*, 372 N.C. 248, 250, 827 S.E.2d 80, 82 (2019).

**B. Sufficiency of Indictments**

**[1]** Our Supreme Court has clearly outlined the requirements for a sufficient indictment:

Generally, an indictment is fatally defective if it fails to state some essential and necessary element of the offense of which the defendant is found guilty. . . . While it is not the function of an indictment to bind the hands of the State with technical rules of pleading, . . . the indictment must fulfill its constitutional purposes—to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime[.]

*Id.* at 250-251, 827 S.E.2d at 82 (internal citations and marks omitted). The consequences of an invalid indictment are equally clear; an invalid indictment requires our Court to vacate any conviction based upon it. *Id.* at 250, 827 S.E.2d at 82.

Defendant challenges the sufficiency of his indictment for attempted armed robbery; thus, we must evaluate his indictment based on the essential and necessary elements of this offense. The essential and necessary elements of armed robbery are “(1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened.” *State v. Ingram*, 160 N.C. App. 224, 226, 585 S.E.2d 253, 255 (2003), *aff’d*, 358 N.C. 147, 592 S.E.2d 687 (2004).

Defendant’s indictment for attempted armed robbery contained the following language:

The jurors for the State upon their oath present that on or about [5 October 1996] and in [Yadkin County] [Defendant] unlawfully, willfully and feloniously did attempt to steal, take and carry away another’s personal property, United States currency, from the person and presence of employees of the Huddle House located at 1538 NC Highway 67, Jonesville, North Carolina. [Defendant] committed this

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act by having in possession and with the use and threatened use of a firearm, a 9mm handgun, whereby the life [sic] of the Huddle House *employees* was [sic] threatened and endangered.

(Emphasis added). The indictment alleges (1) an unlawful attempt to take money from the person and presence of the Huddle House employees, (2) with the use or threatened use of a .9mm handgun, (3) which threatened the lives of those *employees* and at first blush appears to cover all essential elements of attempted armed robbery.

Despite generally satisfying the essential elements, the issue in this case is the amount of specificity required when identifying victims in an indictment for attempted armed robbery in order to bestow jurisdiction on the trial court. Defendant argues the indictment must have included the actual names of the victims. The State disagrees and urges us to find the indictment reasonably identified the victims as “employees of the Huddle House” given that the date and location are provided. Based on binding precedent, we conclude the indictment was required to name a victim.

Attempted armed robbery is a crime against the person. N.C.G.S. § 14-87, which outlines the elements of armed robbery, falls within the subchapter titled “Offenses Against Property” and not “Offenses Against the Person.” N.C.G.S. § 14-87 (2019). However, despite seemingly being categorized by the legislature as a crime against property, we have held

[N.C.G.S.] § 14-87 does not create a new crime, it merely increases the punishment which may be imposed for common law robbery where the perpetrator employs a weapon. . . . The focus of [N.C.G.S. § 14-87] then is not the creation of a new crime for commission of an offense with a firearm, but the punishment of a specific person who has committed a robbery which endangers a specific victim.

*State v. Gibbons*, 303 N.C. 484, 490, 279 S.E.2d 574, 578 (1981) (internal citations omitted). Common law robbery jurisprudence applies to statutory armed robbery.

“Common law robbery[] . . . is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. . . . *It is a crime against the person*, effectuated by violence or intimidation.” *State v. Mann*, 317 N.C. 164, 172, 345 S.E.2d 365, 370 (1986) (emphasis added) (internal citations omitted). Armed robbery is equally a crime against the person, the

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only difference being the use of a firearm or other dangerous weapon. Given that an attempted crime is indistinguishable from a completed crime in terms of the subject of the crime, attempted armed robbery, armed robbery, and common law robbery are all crimes against the person. Characterizing attempted armed robbery as a crime against the person is consistent with our prior holdings on indictments. *See State v. Burroughs*, 147 N.C. App. 693, 696, 556 S.E.2d 339, 342 (2001) (“In an indictment for robbery with firearms or other dangerous weapons ([N.C.G.S. § 14-87]), the gist of the offense is not the taking of personal property, but a taking or attempted taking by force or putting in fear by the use of firearms or other dangerous weapon. While an indictment for robbery (or attempted robbery) with a dangerous weapon need not allege actual legal ownership of property, the indictment must at least name a person who was in charge or in the presence of the property at the time of the robbery, if not the actual, legal owner.”) (internal citations and marks omitted).

The logic underlying the requirement that crimes against the person must identify the victim by name in an indictment is longstanding; where the subject of a crime is a person, indictments should name that person “to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.” *State v. Sturdivant*, 304 N.C. 293, 311, 283 S.E.2d 719, 731 (1981) (citing *State v. Gregory*, 223 N.C. 415, 27 S.E.2d 140 (1943)). *See also White*, 372 N.C. at 250-251, 827 S.E.2d at 82.

Our Supreme Court has held

[i]t is of vital importance that the name of the person against whom the offense was directed be stated with exactitude. . . . The purpose of setting forth the name of the person who is the subject on which an offense is committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have the benefit of one acquittal or conviction if accused a second time.

*State v. Scott*, 237 N.C. 432, 433-434, 75 S.E.2d 154, 155 (1953). Although *Scott* was an assault case, both assault and armed robbery are crimes against the person and identifying that person with exactitude applies equally.

We have reaffirmed the importance of naming victims in indictments in the context of other crimes against the person. In *State*



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*v. McKoy*, 196 N.C. App. 650, 675 S.E.2d 406 (2009), a rape and sex offense case governed by a statute on short form indictments, we “implicitly acknowledge[d] that the indictment must name the victim in some fashion [under the governing statute].” *In re M.S.*, 199 N.C. App. 260, 266, 681 S.E.2d 441, 445 (2009). Although we are not bound by that statute in the case before us, we have held that *McKoy* was consistent with *Scott* by “confirm[ing] that the identity of the victim is still of critical importance in avoiding double jeopardy issues.” *Id.*

We are bound by the reasoning of our Supreme Court in *Scott* that clearly requires that “the name of the person against whom the offense was directed be stated with exactitude.” *Scott*, 237 N.C. at 433, 75 S.E.2d at 155. We cannot hold that “employees of the Huddle House located at 1538 NC Highway 67, Jonesville, North Carolina [on 5 October 1996]” was sufficient; specifically naming a victim of the attempted armed robbery was required. By failing to do so, the indictment for attempted armed robbery was fatally defective and the trial court had no jurisdiction to enter judgment.

**C. Remedy**

[2] Defendant “requests this Court to vacate his conviction for attempted armed robbery.” However, our Supreme Court has held that a “[d]efendant cannot repudiate [a plea agreement] in part without repudiating the whole.” *State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (Steelman, J., dissenting), *rev’d for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012); *see also State v. Pless*, 249 N.C. App. 668, 791 S.E.2d 869 (2016). Here, Defendant pleaded guilty to a reduced charge of second-degree murder, attempted armed robbery, and conspiracy to commit armed robbery with a consolidated sentence. Defendant was to be sentenced to 120 to 153 months on the second-degree murder with “[t]he remaining charges . . . to be consolidated for judgment into the second[-]degree murder charge with no additional time.” By successfully having us vacate the judgment for attempted armed robbery, which was part of Defendant’s plea agreement, we are obliged to vacate the whole plea agreement. The parties can agree to a new plea agreement below or the State may seek a new indictment for attempted armed robbery and/or proceed to trial “on the charges contained in the indictments.” *State v. Green*, 831 S.E.2d 611, 618 (N.C. Ct. App. 2019); *see also State v. Abbott*, 217 N.C. App. 614, 619, 720 S.E.2d 437, 441 (2011).

**CONCLUSION**

We reverse the trial court’s order concluding that “there are no fatal defects in the indictments,” as Defendant’s indictment for attempted

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armed robbery must have named a victim to be valid. The indictment was fatally defective in not doing so, and we must vacate the judgment based upon it. Since we are setting aside a judgment that was entered pursuant to a plea agreement, we vacate the entirety of the plea agreement and remand the entire case back to Yadkin County Superior Court.

REVERSED, VACATED, AND REMANDED.

Judge STROUD concurs.

Judge BRYANT dissents with a separate opinion.

BRYANT, Judge, dissenting.

The majority holds that the indictment charging defendant with attempted armed robbery with a dangerous weapon requires the name of at least one victim of the attempted robbery. Where this indictment refers to a specific group of people—the “employees of the Huddle House” or “Huddle House employees”—I believe the description of the victims is sufficient. Thus, I respectfully dissent.

“A bill of indictment is legally sufficient if it charges the substance of the offense and puts the defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated.” *State v. Ingram*, 160 N.C. App. 224, 225, 585 S.E.2d 253, 255 (2003) (citation omitted). As stated above, common law robbery, statutory armed robbery, and attempted armed robbery are crimes against the person. “Common law robbery[] . . . is the felonious taking of money or goods of any value from the person of another, or in his presence, against his will, by violence or putting him in fear. It is a crime against the person, effectuated by violence or intimidation.” *State v. Mann*, 317 N.C. 164, 172 345 S.E.2d 365, 370 (1986) (citations omitted).

The majority, quoting our Supreme Court’s opinion in *State v. Sturdivant*, 304 N.C. 293, 283 S.E.2d 719 (1981) (reviewing first-degree rape and kidnapping convictions), states that

where the subject of a crime is a person, indictments should name that person “to identify clearly the crime being charged, thereby putting the accused on reasonable notice to defend against it and prepare for trial, and to protect the accused from being jeopardized by the State more than once for the same crime.”

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*Id.* at 311, 283 S.E.2d at 731 (citing *State v. Gregory*, 223 N.C. 415, 27 S.E. 2d 140 (1943)); *see also State v. Scott*, 237 N.C. 432, 433–34, 75 S.E.2d 154, 155 (1953) (“The purpose of setting forth the name of the person who is the subject on which an offense is committed is to identify the particular fact or transaction on which the indictment is founded, so that the accused may have the benefit of one acquittal or conviction if accused a second time.” (citation omitted))).

With respect to indictments charging a defendant with armed robbery, our Supreme Court has reasoned that

*it is not necessary that ownership of the property be laid in a particular person* in order to allege and prove armed robbery. The gist of the offense of robbery is the taking by force or putting in fear. An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property.

*State v. Spillars*, 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1972) (citing *State v. Rogers*, 273 N.C. 208, 159 S.E.2d 525; *State v. Guffey*, 265 N.C. 331, 144 S.E.2d 14; *State v. Sawyer*, 224 N.C. 61, 29 S.E.2d 34) (emphasis added). In *State v. Burroughs*, 147 N.C. App. 693, 556 S.E.2d 339 (2001), this Court held that

[w]hile an indictment for robbery (or attempted robbery) with a dangerous weapon need not allege actual legal ownership of property, the indictment must at least name a person who was in charge or in the presence of the property at the time of the robbery, if not the actual, legal owner. *If the defendant needs further information, he should move for a bill of particulars.*

*Id.* at 696, 556 S.E.2d at 342 (emphasis added) (citation omitted). Later, in *State v. Thompson*, 359 N.C. 77, 604 S.E.2d 850 (2004), addressing an argument challenging the variance between the victim set forth in the indictment and the evidence presented at trial, our Supreme Court provided the following:

It is well established that an indictment for armed robbery need not allege that the property taken “be laid in a particular person.” *State v. Spillars*, 280 N.C. 341, 345, 185 S.E.2d 881, 884 (1972). . . . “The gravamen of the offense is the endangering or threatening of human life by the use or threatened use of firearms or other dangerous weapons

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in the perpetration of or even in the attempt to perpetrate the crime of robbery.” [*State v. Ballard*, 280 N.C. 479, 485, 186 S.E.2d 372, 375 (1972).] “An indictment for robbery will not fail if the description of the property is sufficient to show it to be the subject of robbery and negates the idea that the accused was taking his own property.” *Spillars*, 280 N.C. at 345, 185 S.E.2d at 884; *see also State v. Pratt*, 306 N.C. 673, 681, 295 S.E.2d 462, 467 (1982) (“As long as it can be shown defendant was not taking his own property, ownership need not be laid in a particular person to allege and prove robbery”); *State v. Jackson*, 306 N.C. 642, 650–51, 295 S.E.2d 383, 388 (1982) (“As long as the evidence shows the defendant was not taking his own property, ownership is irrelevant. . . . A taking from one having the care, custody or possession of the property is sufficient”).

*Id.* at 107–08, 604 S.E.2d at 872.

Here, on 28 January 2013, defendant was indicted for the offense of attempted armed robbery with a dangerous weapon. As stated,

[t]he jurors for the State upon their oath present that on or about [5 October 1996] . . . in [Yadkin County] . . . the defendant . . . unlawfully, willfully and feloniously did

attempt to steal, take and carry away another’s personal property, United States currency, from the person and presence of employees of the Huddle House located at 1538 NC Highway 67, Jonesville, North Carolina. The defendant committed this act by having in possession and with the use and threatened use of a firearm, a 9mm handgun, whereby the life [sic] of the Huddle House employees was [sic] threatened and endangered.

Defendant does not challenge that the description of his “attempt to steal, take and carry away another’s personal property, United States currency, from the person and presence of employees of the Huddle House” was sufficient to show the currency to be the subject of robbery and negated the idea that defendant was taking his own property. *See id.* Moreover, I would hold that the description of those persons whose lives were threatened or endangered—the “employees of the Huddle House” or “Huddle House employees”—was sufficient to put “defendant on notice that he will be called upon to defend against proof of the manner and means by which the crime was perpetrated.” *Ingram*, 160 N.C.

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App. at 225, 585 S.E.2d at 255. Should defendant have needed further identification of the alleged victims (such as, in preparation for trial), defendant could have moved for a bill of particulars. *See Burroughs*, 147 N.C. App. at 696, 556 S.E.2d 342. But defendant rather than proceed to trial, defendant entered into a plea agreement with the State.

Along with the charged offense of attempted robbery with a dangerous weapon, defendant pled guilty to charges of conspiracy to commit robbery with a dangerous weapon and second-degree murder. Per the terms of defendant's plea agreement

Defendant is to be sentenced in the mitigated range on the Class B2 offense of second degree murder . . . . The remaining charges of attempted robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon are to be consolidated for judgment into the second degree murder charge *with no additional time*.

(emphasis added). On 2 June 2014, the trial court entered a consolidated judgment in accordance with defendant's plea agreement. Over a year later, defendant filed an MAR in which he raised five grounds for setting aside his conviction, including a lack of jurisdiction. Defendant asserted that

[t]he True Bill of Indictment for Attempted Robbery with a Dangerous Weapon is fatally flawed, and a defective indictment is a prime example of a trial court's lack of jurisdiction. *State v. Ellis* (2005) and *State v. Wagner* (2002). The indictment is flawed in that it fails to allege any person whose life might have been threatened or endangered. *State v. Burroughs*, (2001), *State v. Moore* 305 S.E.2d 542 (1983), *State v. Setzer* 301 S.E.2d 107 (1983), *State v. Matthews*, 358 N.C. 102, 591 S.E.2d 535 (2004). The indictment must allege the essential elements of the crime charged, as required by the North Carolina Constitution, Article I, Section 22, and N.C. Gen. Stat. 15-144, and the 5th and 14th Amendments to the U.S. Constitution, *State v. Sturdivant*, N.C. 283 S.E.2d 719 (1981), and *State v. Crabtree* 212 S.E.2d 103 (1975).

On 9 March 2017, the trial court responded by denying defendant's MAR. The MAR hearing court stated that it "finds and concludes as a matter of law there are no fatal defects in the indictments."

## STATE v. OLDROYD

[271 N.C. App. 544 (2020)]

On 6 January 2018, defendant submitted a supplemental motion for appropriate relief asserting that

a defendant at any time after verdict may by a motion for appropriate relief, raise the ground that *evidence is available which was unknown or unavailable to the defendant at the time of trial, which could not with due diligence have been discovered or made available at that time . . . and which has a direct and material bearing upon the defendant's eligibility for the death penalty or the defendant's guilt or innocence. A motion based upon such newly discovered evidence must be filed within a reasonable time of its discovery.*

(emphasis added). Defendant then proceeded to re-assert his challenge to the elements of the indictment charging him with the offense of attempted robbery with a dangerous weapon, some three-and-a-half years after entry of his guilty plea. In an order entered 16 July 2018, the MAR hearing court denied defendant's supplemental motion for appropriate relief, in pertinent part, on the basis that the arguments had previously been raised in the original MAR and ruled upon. Despite consistent holdings of our Supreme Court that the property taken or attempted to be taken need not "be laid in a particular person," *Spillars*, 280 N.C. at 345, 185 S.E.2d at 884, and even a variance between the individual named in such an indictment and the evidence established is not fatal to the armed robbery charge, *see Thompson*, 359 N.C. at 107–08, 604 S.E.2d at 872—now, before this Court on certiorari review of the MAR orders, a majority of the panel holds that defendant's 2013 indictment is invalid for failure to name a victim. This, despite that the indictment identifies a specific group of victims whom defendant could have sought the names of by a request for a bill of particulars. *See Burroughs*, 147 N.C. App. at 696, 556 S.E.2d 342. The majority fails to directly support its position with any prior holding of this Court or our Supreme Court. The majority's use of cases involving victims of rape and sexual assault are inapposite. I am unaware of any cases determining that a trial court lacked jurisdiction and reversibly erred in entering judgment pursuant to an indictment that did not include the specific name of victims of an attempted armed robbery but where, as here, the indictment identifies a specific group of employees of a particular business as the victims. Under the majority's reasoning which I think is misguided and not legally supported, defendant's 2014 judgment and commitment on the charges of second-degree murder, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon consolidated in accordance with his plea is to be reversed in its entirety.

**STATE v. PERKINSON**

[271 N.C. App. 557 (2020)]

For the foregoing reasons, I would hold that defendant's indictment for attempted armed robbery with a dangerous weapon contains a sufficient description of the victims, such as to not render the indictment fatally defective, and to support the trial court's jurisdiction to accept defendant's guilty plea. Accordingly, I would uphold the MAR hearing courts 9 March 2017 and 16 July 2018 orders denying defendant's MAR made on the basis of a fatally defective indictment.

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STATE OF NORTH CAROLINA

v.

RUSSELL TAYLOR PERKINSON, DEFENDANT

No. COA19-900

Filed 19 May 2020

**Contempt—criminal—notice and opportunity to be heard—  
mootness**

A judgment holding defendant in criminal contempt was reversed on appeal because the trial court failed to provide defendant with summary notice and an opportunity to be heard before entering the judgment, in violation of N.C.G.S. § 5A-14(b). Although defendant had already completed his sentence, the Court of Appeals declined to dismiss his appeal as moot because it has regularly reached the merits of criminal contempt appeals where a defendant had either served the entire sentence or had no sentence at all.

Appeal by defendant from judgment entered 2 July 2019 by Judge Leonard L. Wiggins in Granville County Superior Court. Heard in the Court of Appeals 28 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Nicholas R. Sanders, for the State.*

*Jason Christopher Yoder, for defendant-appellant.*

YOUNG, Judge.

This appeal arises out of a contempt judgment. The trial court erred in failing to provide Defendant with notice and an opportunity to be heard in violation of N.C. Gen. Stat. § 5A-14(b). Accordingly, we reverse the contempt judgment.



## STATE v. PERKINSON

[271 N.C. App. 557 (2020)]

I. Factual and Procedural History

On 16 February 2018, a Walmart employee caught Russell Taylor Perkinson (“Defendant”) stealing a flashlight. Prior to this occasion, Defendant was barred from the store’s property due “to prior thefts and things that happened there.” Defendant was charged with misdemeanor larceny, possession of stolen goods, and first-degree trespass. The District Court convicted Defendant of all the above offenses, and Defendant appealed to Superior Court where he ultimately pled guilty to misdemeanor larceny and first-degree trespass. In exchange, the State dismissed the possession of stolen goods charge.

The plea arrangement provided that Defendant would be sentenced to 180 days of imprisonment, to be suspended with a 30-day split. The arrangement also stated that “[u]ltimate sentencing shall be in the discretion of the court[.]”

The trial court sentenced Defendant to 120 days for misdemeanor larceny and a consecutive 60 days for first-degree trespass. Defendant made an unintelligible remark, and the trial court then held Defendant in direct criminal contempt and sentenced him to 30 additional days.

On 9 July 2019, Defendant filed two separate notices of appeal. Defendant filed a written notice of appeal identifying only the criminal judgments that had been entered against him in the file number 18 CRS 50277. Defendant also filed a second written notice of appeal specifically identifying the contempt judgment. On 19 July 2019, the trial court interpreted Defendant’s second notice of appeal as a motion for appropriate relief to have his plea stricken but denied relief.

On 18 September 2019, Defendant filed with this Court a petition for *writ of certiorari* seeking review of: (1) the 1 July 2019 judgment of contempt and (2) the 29 July 2019 order (Appellate Entries) denying appeal bond. By order dated 25 September 2019, this Court dismissed the petition in part and denied in part. “To the extent defendant seeks review of the criminal contempt order entered . . . on 1 July 2019, the petition is dismissed without prejudice to refile upon the docketing of the appeal to this Court . . . .”

On 9 October 2019, Defendant filed a Notice of Withdrawal of Appeal and a Motion for Appropriate Relief/ Motion to Withdraw the Plea in file number 18 CRS 50277. On 10 October 2019, the Superior Court entered a consent order on Defendant’s Motion for Appropriate Relief allowing Defendant to withdraw his plea, vacated the judgment for misdemeanor larceny and first-degree trespass, and allowed the



**STATE v. PERKINSON**

[271 N.C. App. 557 (2020)]

State to proceed upon the original plea offer. After the new judgments were entered, this Court allowed Defendant to amend the record on appeal adding documents from file number 18 CRS 50277. Defendant solely appeals the contempt judgment.

**II. Standard of Review**

Whether a trial court violated N.C. Gen. Stat. §5A-14 is an issue of law reviewed *de novo* as a violation of a statutory mandate. *State v. Harding*, 258 N.C. App. 306, 316, 813 S.E.2d 254, 262 (2018). Under the *de novo* standard, this Court “considers the matter anew and freely substitutes its own judgment for that of the lower” court. *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

**III. Contempt**

Defendant contends that the trial court failed to give him notice and an opportunity to be heard before entering judgment in accordance with N.C. Gen. Stat. § 5A-14(b). We agree.

Our General Assembly requires that before entering a judgment for direct criminal contempt, “the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt.” N.C. Gen. Stat. § 5A-14(b) (2019). Under § 5A-14(b), this Court has found that in a summary proceeding the defendant must be told the basis for the contempt and given an opportunity to respond before punishment is imposed. *State v. Verbal*, 41 N.C. App. 306, 307, 254 S.E.2d 794, 795 (1979).

The findings and order signed by the trial court contains a pre-printed finding that “the contemnor was given summary notice of the charges and summary opportunity to respond.” The form does not include a checkbox or any other specific indication that this finding was made. However, the record directly contradicts this form language, showing instead that judgment and sentence were imposed without any notice, and no opportunity to be heard was given. The trial court’s “finding” on this form is unsupported by the evidence.

The State contends that the case is moot because Defendant has completed his thirty-day sentence. This suggests that a judge may criminally confine a defendant and then escape judicial review so long as the sentence has been completed. Being that it takes at least a year for a case to come up on appeal, this would render most, if not all, contempt judgments moot on appeal. This Court has reached the merits in

## STATE v. RUSSELL

[271 N.C. App. 560 (2020)]

criminal contempt appeals, despite the fact that the defendant served the entire sentence or had no sentence at all.

For instance, in *State v. Randell*, the trial court released the defendant for “time served.” 152 N.C. App. 469, 471, 567 S.E.2d 814, 816 (2002). Despite the fact that he served his entire sentence, this Court reached the merits of the case and reversed the trial court order finding the defendant in criminal contempt. *Id.* at 473, 567 S.E.2d at 817. *Randell* was reversed for precisely the same reason that Defendant seeks reversal. *Id.*

Based on the trial court’s failure to give Defendant summary notice and an opportunity to be heard before entering judgment in accordance with N.C. Gen. Stat. § 5A-14(b), we reverse the trial court’s contempt judgment.

REVERSED.

Judges BRYANT and BROOK concur.

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STATE OF NORTH CAROLINA  
v.  
MATTHEW ROBINSON RUSSELL, DEFENDANT

No. COA19-848

Filed 19 May 2020

**1. Assault—inflicting serious bodily injury—absence of victim’s consent—not a required element**

At a trial for assault inflicting serious bodily injury (AISBI) arising from an altercation at a bar, during which defendant broke another man’s jaw after the man told defendant to hit him, the trial court did not err when it declined to instruct the jury on consent because the absence of consent to an assault is not a required element of AISBI and, at any rate, a victim’s consent to a criminal offense does not bar the State from prosecuting that offense.

**2. Discovery—sanctions—criminal case—State’s failure to disclose expert witness’s fee**

At a trial for assault inflicting serious bodily injury, the trial court did not abuse its discretion by declining to sanction the State for an alleged discovery violation, where the State failed to disclose

**STATE v. RUSSELL**

[271 N.C. App. 560 (2020)]

an expert witness's fee to defense counsel before trial (per defendant's request). The trial court determined that the State's error was an honest mistake, nothing in the record indicated that this determination was arbitrary or unreasonable, and defendant could not demonstrate a reasonable probability of a different result at trial had he been allowed to cross-examine the expert about his fee.

Judge HAMPSON concurring in result with separate opinion.

Appeal by defendant from judgment entered 25 January 2019 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 29 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Deborah Greene, for the State.*

*Attorney Jon W. Myers for defendant-appellant.*

BERGER, Judge.

Matthew Robinson Russell ("Defendant") appeals his conviction of assault inflicting serious bodily injury ("AISBI"), alleging the trial court erred when it (1) denied Defendant's motion for a jury instruction on consent; and (2) declined to sanction the State for an alleged discovery violation. We disagree.

**Factual and Procedural Background**

In 2016, Defendant and his girlfriend, Jackie Neely ("Neely"), ended their relationship. Shortly thereafter, Daniel Leonard ("Leonard") and Neely began a relationship.

On November 10, 2016, Leonard and Neely met friends at a local bar in Greensboro. Defendant was at the bar, and at some point, Defendant asked Leonard to go outside and talk. During the exchange, Leonard told Defendant to hit him. Defendant then struck Leonard, breaking his jaw in two places. According to one witness, the punch was not thrown immediately after Leonard's statement, but, rather, it came "kind of out of nowhere." As a result of his injuries, Leonard underwent surgery to repair the damage to his jaw. After Defendant hit Leonard, Defendant entered the bar and then left in a car.

Defendant's case came on for trial on January 24, 2019. A Guilford County jury found Defendant guilty of AISBI, and he was placed on

## STATE v. RUSSELL

[271 N.C. App. 560 (2020)]

supervised probation. Defendant appeals, arguing the trial court erred when it (1) denied Defendant's motion for a jury instruction on consent; and (2) declined to sanction the State for an alleged discovery violation. We disagree.

AnalysisI. Jury Instruction

[1] Defendant first argues that the trial court erred when it denied his motion for North Carolina Pattern Jury Instruction ("PJI") 120.20 to be given to the jury when Leonard's consent to the assault was raised during the course of the trial. Defendant further argues that absence of consent is a required element of AISBI.

"A trial judge is required by N.C.G.S. § 15A-1231 and N.C.G.S. § 15A-1232 to instruct the jury on the law arising from the evidence. This includes instruction on the elements of the crime." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). If a request for a special instruction is made, "which is correct in itself and supported by evidence, the court must give the instruction at least in substance." *State v. Lamb*, 321 N.C. 633, 644, 365 S.E.2d 600, 605-06 (1988) (citation and quotation marks omitted). "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Voltz*, 255 N.C. App. 149, 156, 804 S.E.2d 760, 765 (2017) (citation and quotation marks omitted). "Instructions that as a whole present the law fairly and accurately to the jury will be upheld." *State v. Cagle*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 830 S.E.2d 893, 897 (2019) (citations and quotation marks omitted), *cert. denied*, 838 S.E.2d 185 (2020).

"There is no statutory definition of assault in North Carolina, and the crime of assault is governed by common law rules." *State v. Roberts*, 270 N.C. 655, 658, 155 S.E.2d 303, 305 (1967). "An [a]ssault is an intentional attempt, by violence, to do an injury to the person of another." *State v. Davis*, 23 N.C. 98, 99 (1840). "Th[e] common law rule [of assault] places emphasis on the intent or state of mind of the person accused." *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305.

A defendant may be convicted of AISBI if the State proves beyond a reasonable doubt that the defendant "assault[ed] another person and inflict[ed] serious injury." N.C. Gen. Stat. § 14-32.4(a) (2019). Again, the statute does not define assault, and we must refer to the common law definition. It is undisputed that Defendant intentionally struck Leonard, thereby causing serious bodily injury. Defendant argues on appeal, however, that absence of consent is an element of assault, and the trial court erred when it declined to so instruct the jury.

## STATE v. RUSSELL

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As set forth above, our Supreme Court has defined assault as “an intentional attempt, by violence, to do an injury to the person of another.” *Davis*, 23 N.C. at 99. This definition has stood the test of time. In addition, our Supreme Court has instructed this Court that the focus of our analysis when trying to determine if an assault occurred should be “on the intent or state of mind of the person accused.” *Roberts*, 270 N.C. at 658, 155 S.E.2d at 305. We see nothing in the common law definition of assault that supports Defendant’s argument concerning consent.

Furthermore, because “there is no consent on the part of the State, which is the complaining party in a criminal prosecution and represents the public interest invaded by the crime itself, the consent of the [victim] is ordinarily no bar to a criminal prosecution.” Restatement (Second) of Torts § 892C cmt. b (1979). This case highlights a foundational principle that undergirds our criminal law: an offense against a person may also constitute an offense against the interest of the community at large. Defendant concedes in his brief that “the vast majority of jurisdictions hold that harmful actions, even if consented to, violate public policy[.]”

In the case of violent crimes, the State’s interest is implicated by a defendant’s conduct in breaching the peace. It is for this reason that a victim’s consent to a violent criminal offense cannot absolve a defendant of criminal liability. While a victim may release a defendant from civil liability, a victim cannot consent to the commission of a criminal offense and thereby bind the hands of the State. *See State v. Bass*, 255 N.C. 42, 45, 120 S.E.2d 580, 582 (1961) (parties could not consent to the crime of mayhem because the conduct was “an atrocious breach of the king’s peace” at common law); *State v. Fritz*, \_\_\_ N.C. \_\_\_, \_\_\_, 45 S.E. 957, 958 (1903) (dueling was “an aggravated form of affray, and under such indictment the parties [could] be convicted of a mutual fighting by consent.”); *State v. Allen & Royster*, \_\_\_ N.C. \_\_\_, \_\_\_, 4 Hawks 356, \_\_\_ (1826) (holding that individuals may be convicted of assault, even if consented to, when occurring “in a public place, to the terror of the citizens.”).<sup>1</sup>

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1. The State cites authority from across the country on this point: *State v. Mackrill*, 345 Mont. 469, 476, 191 P.3d 451, 457 (2008) (“[I]t is against public policy to permit a person purposely or knowingly to cause serious bodily injury to another, even though that conduct and resulting harm were consented to.”); *State v. Fransua*, 85 N.M. 173, 174, 510 P.2d 106, 107 (N.M. App. 1973) (“[A] state enacts criminal statutes making certain violent acts crimes for at least two reasons: One reason is to protect the persons of its citizens; the second, however, is to prevent a breach of the public peace. While we entertain little sympathy for either the victim’s absurd actions or the defendant’s equally unjustified act of pulling the trigger, we will not permit the defense of consent to be raised in such cases. Whether or not the victims of crimes have so little regard for their own safety as to request injury, the public has a stronger and overriding interest in preventing and prohibiting acts

## STATE v. RUSSELL

[271 N.C. App. 560 (2020)]

Because absence of consent is not an element of assault, and thus not an element of AISBI, the trial court did not err when it declined to instruct the jury on consent.<sup>2</sup>

## II. Discovery

**[2]** Defendant next contends that the trial court erred when it declined to sanction the State for failure to provide defense counsel with the fee statement of an expert witness. Defendant contends that not having this information prevented him from cross-examining the expert. We disagree.

N.C. Gen. Stat. Section 15A-903 provides that upon request, the State must provide “notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial.”<sup>3</sup> N.C. Gen. Stat. § 15A-903(a)(2) (2019). Defendant requested information regarding “[a]ny and all consideration or promises of consideration given to or made on behalf of government witnesses” including “witness fees” in a motion in limine on January 18, 2019. The State failed to disclose information related to the expert’s witness fee prior to trial as requested by Defendant and disclosed this failure to the court at the sentencing portion of the trial. The trial court determined that the State’s failure to disclose was an “honest mistake.”

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such as these.” (citation omitted)); *State v. Brown*, 143 N.J. Super. 571, 572, 364 A.2d 27, 28 (N.J. Super. Ct. Law Div. 1976) (“[W]hile the consent of the victim may relieve defendant of liability in tort, this same consent has been held irrelevant in a criminal prosecution, where there is more at stake than a victim’s rights.”), *aff’d per curiam*, 154 N.J. Super. 511, 381 A.2d 1231 (N.J. Super. Ct. App. Div. (1977)).

2. Our concurring colleague contends that there was insufficient evidence from which the jury could infer that the victim consented at all. It is true that based on all the testimonies from the victim and the witnesses, there is a strong inference that the victim was not actually inviting Defendant to hit him, but rather was trying to de-escalate the situation. However, because there was some evidence from which the jury could infer consent, the trial court had to consider the issue of Defendant’s requested instruction. It is not for us, or the trial judge, to assign weight and credibility to each witness’s testimonies. That function belongs to the jury alone.

3. Defendant’s counsel failed to instruct this Court on how Defendant’s rights under Section 15A-903 were violated beyond a mere cursory discussion of the statute. Defendant’s counsel did not cite or discuss the statute providing the right Defendant alleges was violated beyond the section heading of the assignment of error. Further, Defendant’s counsel cites authority that (1) does not support Defendant’s position and (2) does not stand for the proposition for which it is cited. Defendant’s counsel is reminded that compliance with the Appellate Rules is a minimum standard for a case to be reviewed by this Court, and “[i]t is not the duty of this Court to supplement an appellant’s brief with legal authority or arguments not contained therein.” *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005); N.C. R. App. P. 28 (2019).

**STATE v. RUSSELL**

[271 N.C. App. 560 (2020)]

It is unclear from the record that the trial court found that a discovery violation had occurred. Even if we assume the trial court's statement that the failure to disclose was an "honest mistake" was a finding of a discovery violation, we find no prejudice to Defendant and no error.

Where "the prosecutor's actions constitute[] a discovery violation, the trial judge still retain[s] broad discretion to determine if sanctions [are] appropriate." *State v. Nolen*, 144 N.C. App. 172, 184, 550 S.E.2d 783, 790 (2001). The trial court's decision to impose, or not impose, sanctions for abuse of discovery orders "will not be reversed absent a showing of abuse of that discretion." *State v. Aguilar-Ocampo*, 219 N.C. App. 417, 422, 724 S.E.2d 117, 121-122 (2012) (citation and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Foster*, 235 N.C. App. 365, 377, 761 S.E.2d 208, 217 (2014) (citations and quotation marks omitted). In addition, the trial court is not required "to make specific findings on the record that it considered sanctions before determining not to impose sanctions." *State v. Jones*, 151 N.C. App. 317, 325, 566 S.E.2d 112, 117 (2002).

Here, the expert's testimony was corroborative testimony. It served only to provide the jury with a clearer picture of the injuries sustained by Leonard, the surgery required as a result of those injuries, and pain levels Leonard endured. Defendant has not demonstrated that there was a reasonable probability of a different result had he been allowed to question the expert about his \$875.00 witness fee.

In addition, N.C. Gen. Stat. Section 15A-910 requires that prior to *imposing* sanctions the trial court "shall consider both the materiality of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article or an order issued pursuant to this Article." N.C. Gen. Stat. § 15A-910(b) (2019). Here, the trial court determined that no sanctions were appropriate, and, thus, was not required to "make specific findings on the record that it considered sanctions." *Jones*, 151 N.C. App. at 325, 566 S.E.2d at 117.

The trial court's determination that no sanctions were appropriate was based upon the fact that the prosecutor's error was an "honest mistake." There is nothing in the record from which we could determine this decision was so arbitrary that it could not have been the result of a reasoned decision. Thus, the trial court did not err when it declined to sanction the State.

## STATE v. RUSSELL

[271 N.C. App. 560 (2020)]

Conclusion

For the foregoing reasons, Defendant received a fair trial, free from error.

NO ERROR.

Judge DILLON concurs.

Judge HAMPSON concurs in separate opinion.

HAMPSON, Judge, concurring in result.

I concur in the result reached by the majority. My analysis, however, differs on the question of whether the trial court erred in failing to provide a specific instruction to the jury on the victim's alleged consent to the assault inflicting serious bodily injury.

I conclude, like the majority, the trial court did not err in declining to give the instruction requested by Defendant. In my analysis, though, I would simply hold the evidence did not support submission of the instruction relating to the victim's consent to the jury. *See State v. Brown*, 182 N.C. App. 115, 117, 646 S.E.2d 775, 777 (2007) ("A trial court must give a requested instruction if it is a correct statement of the law *and supported by the evidence.*" (emphasis added) (citation omitted)). The victim here certainly did not consent to the assault by Defendant inflicting serious bodily injury. Indeed, it is arguable whether the evidence could support a finding the victim actually consented to *any* assault whatsoever.<sup>1</sup>

The evidence reflects: Defendant and the victim were acquaintances. Defendant discovered the victim at a bar with Defendant's ex-girlfriend

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1. The majority takes issue with this assertion. However, contrary to the majority's characterization, this does not mean I think there is "insufficient evidence" to go to the jury as to consent to any assault. Rather, I mean what I say: the evidence is arguable as to consent to any assault—or to put it in the parlance of the majority: "there is a strong inference that the victim was not actually inviting Defendant to hit him." The real gist of the majority's critique is that my analysis somehow invades the province of the jury to weigh the evidence of consent. Not so. It is a judicial function to determine whether the evidence supports submission of a particular instruction to the jury. Here, on the facts of this case, the evidence does not support a finding the victim consented to assault inflicting serious bodily injury supporting Defendant's requested instruction. In any event, under the majority opinion, consent may *never* be a jury issue in a criminal assault case—a far less narrow result with potentially far-reaching ramifications well beyond a bar fight.



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and others. Defendant became angry, and he and the victim stepped out of the bar “to talk.” Defendant was visibly agitated. The victim testified: “We had a conversation. We walked out. I started the conversation. I told him I was sorry for what I did. I know you’re mad. If you want to hit me, hit me, but this is not the way we need to solve this issue. We’re both adults.” The victim further testified the argument continued and Defendant subsequently blindsided the victim with a punch that broke the victim’s jaw in two places.

Two eyewitnesses testified to hearing the victim invite Defendant to “hit me.” However, the first eyewitness testified: “[Defendant] was angry, yelling about a situation . . . [the victim] was trying to talk it out. . . . I believe he did say let’s talk about it, and even after he did get hit, he did still try to talk about it. But he never showed any aggression in return.” The second eyewitness testified the victim “said hit me at least twice, and then the arguing continued.” The second eyewitness confirmed: “[the victim] said it multiple times, and there was arguing in between. So it wasn’t immediate.” According to this second eyewitness, when the punch occurred, “[i]t was kind of out of nowhere.” The second eyewitness recalled her impression: “I mean I wasn’t in fear of either. I didn’t think that they would actually get into an altercation.” Thus, put in context, the evidence reflects the victim was not inviting an assault but attempting to deescalate the situation by trying to convince Defendant to talk through the disagreement.

Therefore, because the evidence did not, in fact, reflect the victim’s consent to being sucker punched by Defendant resulting in serious bodily injury, the trial court did not err in declining to provide the instruction requested by Defendant. *See id.* (citation omitted). Consequently, I agree there was no error in Defendant’s trial. Accordingly, I concur in the result.

**STATE v. SASEK**

[271 N.C. App. 568 (2020)]

STATE OF NORTH CAROLINA

v.

SCOTT EDWARD SASEK, DEFENDANT

No. COA19-769, 19-770

Filed 19 May 2020

**1. Evidence—expert testimony—admissibility—reliable application of principles and methods—plain error analysis**

In a prosecution for the sale of methamphetamine and possession with intent to sell or deliver a schedule II controlled substance, which arose after a confidential informant obtained a crystalline substance from defendant during a controlled buy, the trial court erred in admitting expert testimony identifying the substance as methamphetamine where the expert did not explain how she reliably applied certain testing methods in defendant's case, as required under Evidence Rule 702(a). However, the trial court's error did not rise to the level of plain error justifying a new trial because the expert explained the testing procedure itself, testified as to the results she reached, and produced a lab report detailing those results, thereby showing that her conclusions did not stem from "baseless speculation."

**2. Probation and Parole—probation revocation hearing—unreasonable delay—vacating without remand**

In a prosecution for various drug offenses, the trial court improperly revoked defendant's probation (for a prior, unrelated conviction) without first making the required finding under N.C.G.S. § 15A-1344(f)(3) that good cause existed to reactivate defendant's sentence fourteen months after his probation had expired. Further, because the record contained no evidence that the State made reasonable efforts to conduct the revocation hearing at an earlier date, the judgments revoking defendant's probation were vacated without remand.

Judge BERGER concurring by separate opinion.

Appeal by Defendant from judgments entered 22 March 2019 by Judge Gary M. Gavenus in Yancey County Superior Court. Heard in the Court of Appeals 31 March 2020.

*Attorney General Joshua H. Stein, by Assistant Attorneys General Allison A. Angell and Barry H. Bloch, for the State.*

## STATE v. SASEK

[271 N.C. App. 568 (2020)]

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for Defendant.*

INMAN, Judge.

Scott Edward Sasek (“Defendant”) appeals from the trial court’s judgments convicting him of possession with intent to sell or deliver a schedule II controlled substance and sale of methamphetamine, and subsequently revoking his probation. Defendant contends that the trial court committed plain error by admitting expert testimony without first ensuring that it was achieved by reliable principles and methods. Defendant further contends that there was no justifiable reason for the trial court’s delay in holding his probation revocation hearing. After careful review, we find no plain error in Defendant’s convictions, but vacate the trial court’s judgments revoking Defendant’s probation.

**I. Factual and Procedural Background**

In July 2016, prior to the events of this case, Defendant pleaded guilty to charges of obtaining property by false pretenses. The court sentenced Defendant to 8 to 19 months imprisonment, suspended upon completion of 18 months of supervised probation to expire in January 2018.

On 15 February 2017, a confidential informant for the Yancey and Mitchell County Sheriff’s Offices (“YMCSO”) allegedly purchased methamphetamine from Defendant outside of a department store in Yancey County.

***A. The Controlled Buy***

The YMCSO had previously worked with the informant “25 or 50 times” since January 2017. On February 15, the informant informed an officer with YMCSO that he had a lead to buy methamphetamine from Defendant. The informant and the officer arranged for a controlled buy to occur later that day in a department store parking lot.

The informant met with Defendant in the parking lot and conducted the purchase with money provided by the YMCSO. After completing the transaction, the informant met with an officer and handed him a clear plastic baggie containing a clear crystal substance “that [he] got from [Defendant].” The officer searched the informant and discovered that he no longer had the money provided for the buy.

Probation violation reports were filed against Defendant on 17 May 2017 and 3 January 2018, each alleging that Defendant violated the

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terms of his probation by failing to “[c]ommit no criminal offense in any jurisdiction.” Defendant was later indicted on 27 November 2017 and 29 May 2018 with a number of crimes related to the controlled buy of methamphetamine.

*B. Expert Testimony at Trial*

Defendant’s charges came on for trial on 18 March 2019. At trial, Ms. Deborah Chancey of the North Carolina State Crime Lab presented testimony about her examination of the contents of the plastic baggie the informant received from Defendant. Chancey was admitted as an expert in drug chemistry without objection following a series of questions regarding her nearly ten years of experience as a Crime Lab employee. Chancey explained that the general procedure for testing unknown substances involves a series of preliminary tests to “indicate the class of drug that may be present,” followed by confirmatory testing. Consistent results across multiple tests indicate the type of substance in the sample.

Chancey testified that, for this case, she was asked to test a plastic baggie containing 2.69 grams of a crystalline substance for the presence of a controlled substance. Chancey first conducted a preliminary color test, which produced “inconclusive” results. Chancey then performed an infrared test, which indicated the substance was primarily a diluent, “not a controlled substance.” Next, Chancey performed a “gas chromatography mass spectrometer” test (the “GCMS test”) on the substance. In a GCMS test, Chancey explained, the molecules in a substance are separated, timed as they pass through a gas column, and then bombarded into fragments by electrons. The examiner then performs a “visual comparison, a peak-to-peak analysis” of the sample’s fragmentation patterns produced by the GCMS test versus a known standard pattern for a controlled substance.

Chancey then began to explain how she applied the GCMS testing methods on the sample in this case, and the result she obtained, but the State interrupted her testimony to inquire about the recognition of GCMS testing in the scientific community. Chancey testified that GCMS testing was well-respected in the scientific community and confirmed that she had recorded the results of her testing in this case in a lab report. The lab report was then admitted into evidence without objection. Following the admission of her lab report, Chancey testified without objection that it was her opinion that the substance the informant received from Defendant “was material containing methamphetamine, Schedule II.”

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At the close of the State's evidence, Defendant moved to dismiss all charges for insufficient evidence, and the trial court denied Defendant's motions. Defendant did not put on evidence.

*C. Verdicts and Sentencing*

The jury convicted Defendant of possession of methamphetamine, possession with intent to sell or deliver a schedule II controlled substance, sale of methamphetamine, and delivery of methamphetamine. Defendant then pleaded guilty to having attained habitual felon status.

Prior to sentencing, Defendant admitted that he failed to "[c]ommit no criminal offense" in violation of his probation, as alleged in the 17 May 2017 violation report. The trial court then found that Defendant had violated his probation based solely on the methamphetamine-related violation alleged in the 17 May 2017 violation report.

As part of Defendant's habitual felon plea, the parties agreed that any sentences activated as a result of Defendant's revocation of probation would run concurrently with sentences imposed by the jury's verdicts. The trial court sentenced Defendant to 84 to 113 months imprisonment for possession with intent to sell or deliver a schedule II controlled substance; 96 to 131 months imprisonment for sale of methamphetamine, to run consecutively; and reactivated the suspended sentence of 8 to 19 months imprisonment for violation of probation, to run concurrently. The court arrested judgment on Defendant's remaining convictions. Defendant gave notice of appeal in open court.

*II. Analysis*

Defendant presents two arguments arising from the 18 March 2019 trial: (1) the trial court erred by allowing Chancey to present her expert opinion without proper foundation; and (2) there was no justifiable reason for the trial court's delay in holding Defendant's probation revocation hearing after his probation expired. We address each issue in turn.

*A. Admission of Expert Testimony*

**[1]** Defendant challenges the trial court's admission of Chancey's expert opinion that the baggie the informant received from Defendant contained methamphetamine, a schedule II controlled substance. However, Defendant made no objections at trial during any stage of Chancey's testimony. Trial judges have a special obligation to ensure that expert testimony "is not only relevant, but reliable[,] but "an unpreserved challenge to the performance of a trial court's gatekeeping function in admitting opinion testimony in a criminal trial is subject to plain error review

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in North Carolina state courts.” *State v. Hunt*, 250 N.C. App. 238, 245–46, 792 S.E.2d 552, 558–59 (2016). Plain error review requires a showing by the defendant that a “fundamental error occurred at trial” which “had a probable impact on the jury’s finding that the defendant was guilty.” *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

Proof that the substance at issue is a controlled substance is a requisite element for the crimes of possession with intent to sell or deliver a schedule II substance and sale of methamphetamine. See *State v. Bridges*, 257 N.C. App. 732, 733, 810 S.E.2d 365, 367, review denied, 371 N.C. 339, 813 S.E.2d 856 (2018); N.C. Gen. Stat. § 90-95(a)(1) (2017). Methamphetamine is a schedule II controlled substance in North Carolina. N.C. Gen. Stat. § 90-90(3)(c) (2017). “[T]he burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution.” *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010). Expert witness testimony describing “some form of scientifically valid chemical analysis” is ordinarily necessary to identify a controlled substance, unless the State can show beyond a reasonable doubt that some other method of identification is sufficient. *Id.*<sup>1</sup>

Rule 702 of the North Carolina Rules of Evidence states that “if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,” the testimony of an expert witness as to his or her opinion is admissible if the following can be shown:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.
- (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2017). Application of this “three-pronged reliability test” is a preliminary question to be determined at the discretion of the trial court, reversible only upon a showing that the court abused its discretion. *State v. McGrady*, 368 N.C. 880, 892–893, 787 S.E.2d 1, 10–11 (2016). Where the State seeks to prove the identity of a

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1. Contrary to Defendant’s assertion that “[c]ontrolled substances can only be identified through the use of chemical analysis[.]” our Supreme Court has held that “the absence of an admissible chemical analysis of the substance that defendant allegedly possessed does not necessitate a determination that the record evidence failed to support the jury’s decision to convict defendant of possessing [a controlled substance].” *State v. Osborne*, 372 N.C. 619, 631, 831 S.E.2d 328, 336 (2019).

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controlled substance via expert testimony, such testimony is admissible only when it is “based on a scientifically valid chemical analysis and not mere visual inspection.” *Ward*, 364 N.C. at 142, 694 S.E.2d at 744.

Defendant contends that “[t]he trial court abused its discretion when it admitted Chancey’s testimony and lab report identifying the substance in question as methamphetamine because there was an insufficient foundation for this opinion under Rule 702.” Specifically, Defendant argues that Chancey’s testimony was admitted without proof that she reliably applied the scientific principles and methods of GCMS testing to the facts of this case. Defendant further reasons that this error was prejudicial because, without the expert’s testimony, the State failed to produce evidence that the substance the informant received from Defendant was a controlled substance.

Defendant proposes that the present case is analogous to our Court’s decision in *State v. McPhaul*, 256 N.C. App. 303, 808 S.E.2d 294 (2017). In *McPhaul*, an expert fingerprint examiner testified to her opinion that the defendant’s fingerprints matched fingerprint impressions found on material evidence in his murder trial. *Id.* at 313–16, 808 S.E.2d at 303–05. The examiner began her testimony by explaining that each person’s fingerprints contain distinguishing characteristics known as “minutia” points that can be used to identify the owner of the fingerprints. *Id.* at 314, 808 S.E.2d at 304. She described the method she generally used to identify fingerprints. *Id.* She then confirmed that procedure was the “same examination technique as is commonly used in the field of latent print identification[,]” and even that “she employed this procedure while conducting her examination in [the] case.” *Id.* at 315, 808 S.E.2d at 304. But, when asked how she arrived at her opinion that the fingerprint sample she tested matched the defendant’s fingerprints, the examiner testified simply that the described procedure, her training, and her experience led her to that conclusion without explaining how she applied that procedure in the defendant’s case. *Id.* at 315–16, 808 S.E.2d at 304–05. “Without further explanation for her conclusions, [the examiner] implicitly asked the jury to accept her expert opinion that the prints matched.” *Id.* at 316, 808 S.E.2d at 305. This Court held that the examiner “failed to demonstrate that she ‘applied the principles and methods reliably to the facts of the case,’ as required by Rule 702(a)(3),” and held that “the trial court abused its discretion by admitting this testimony.” *Id.*

The expert testimony in this case is materially indistinguishable from that in *McPhaul*. At trial, Chancey explained the scientific details of color testing and infrared testing, then explained how she applied

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the tests to the substance and the results she obtained. Chancey then explained the scientific procedure for GCMS testing and confirmed that it was a reliable and a well-respected process but was cut off before she could explain how she applied GCMS testing in the present case. Rather, Chancey's lab report recording her GCMS testing procedures and results was admitted into evidence and published to the jury.

We note that Chancey appeared fully prepared to explain how she applied GCMS testing in this case but was never given the opportunity. Chancey's report, which was admitted in evidence in lieu of further testimony concerning her application of GCMS testing in this case, states only that the "[p]lastic bag containing crystalline material" was "[e]xamine[d] for controlled substances" and found to contain methamphetamine. Like the examiner in *McPhaul*, Chancey "provided no such detail in testifying how she arrived at her actual conclusions *in this case*[,] and her testimony instead "implicitly asked the jury to accept her expert opinion." *McPhaul*, 256 N.C. App. at 316, 808 S.E.2d at 305 (emphasis in original). We therefore hold that the trial court erred by admitting Chancey's expert opinion testimony without first requiring that she explain how she applied GCMS testing in this case.

Nonetheless, Defendant has not met the high threshold to establish plain error. Our Court has previously held a criminal defendant failed to establish plain error when an expert testified that a chemical analysis was performed, but the evidence "lack[ed] any discussion of that analysis." *State v. Piland*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 822 S.E.2d 876, 888 (2018). In *Piland*, the defendant was discovered in possession of a pill bottle containing a large quantity of white tablets. *Id.* at \_\_\_, 822 S.E.2d at 881 (2018). A drug examiner testified that she "performed a chemical analysis on a single tablet to confirm that they did in fact contain what the manufacturer had reported" and concluded that the tablets were indeed hydrocodone, but did not elaborate further as to how she conducted her analysis. *Id.* at \_\_\_, 822 S.E.2d at 888. The *Piland* Court held that, though "it was error for the trial court not to properly exercise its gate-keeping function of requiring the expert to testify to the methodology of her chemical analysis[,] the expert's results were not clearly "baseless speculation" and "her testimony was not so prejudicial that justice could not have been done." *Id.*

We reach the same conclusion here. Chancey testified that she conducted the GCMS test in this case, obtained positive results identifying the substance the informant received from Defendant to be methamphetamine, and produced a lab report recording the results of her analysis. We hold, as we did in *Piland*, that the trial court's error "does not



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amount to plain error because the expert testified that she performed a ‘chemical analysis’ and as to the results of that chemical analysis.” *Id.*

B. *Revocation of Probation*

[2] Defendant argues, and the State concedes, that the trial court erred by activating his suspended sentence without making a finding that good cause existed to revoke his probation after the period of probation expired. N.C. Gen. Stat. § 15A-1344(f)(3) (2017) (“The court may . . . revoke probation after the expiration of the period of probation if all of the following apply: . . . (3) The court finds for good cause shown and stated that the probation should be . . . revoked.”); *State v. Morgan*, 372 N.C. 609, 616, 831 S.E.2d 254, 259 (2019) (“We conclude that both the plain language of N.C.G.S. § 15A-1344(f)(3) and our prior decisions . . . compel the conclusion that the trial court erred by activating defendant’s sentences without first making such a finding.”). Defendant’s probation expired in January 2018. The trial court activated Defendant’s suspended sentence in March 2019, fourteen months later. Our review of the trial court’s judgments confirms that the court made no findings that good cause existed for this delay.

Defendant contends that the trial court’s error requires this Court to vacate his probation revocation without remand to the trial court because “the record is devoid of any evidence that could support a finding on remand that good cause exists to revoke [Defendant’s] probation despite the expiration of his probationary period.” We agree.

Ordinarily, when the trial court fails to make a material finding of fact, the case must be remanded so that proper findings can be made. *State v. Bryant*, 361 N.C. 100, 104, 637 S.E.2d 532, 535 (2006). However, when the trial court fails to make a finding of good cause under N.C. Gen. Stat. § 15A-1344(f)(3), we may only remand where “the record contain[s] sufficient evidence to permit the necessary finding of ‘reasonable efforts’ by the State to have conducted the probation revocation hearing earlier.” *Morgan*, 372 N.C. at 618, 831 S.E.2d at 260 (citing *Bryant*, 361 N.C. at 104, 637 S.E.2d at 535–536). Our Courts have vacated without remand when the record on appeal did not show that the State made reasonable efforts to conduct an earlier probation hearing and the defendant’s probation was revoked as little as thirty-six days after its expiration. *State v. Camp*, 299 N.C. 524, 528, 263 S.E.2d 592, 595 (1980).

Here, a probation hearing on Defendant’s 17 May 2017 violation report was initially scheduled for 13 June 2017, and the record does not indicate why the hearing did not take place until March 2019, fourteen months after his probation expired. The State contends that “[i]t is

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reasonable to infer from the record that Defendant wished to proceed on the underlying possession of methamphetamine charge first, before proceeding on his probation violations[.]” However, nothing in the record indicates this was Defendant’s intention, and a criminal conviction is not required for the trial court to revoke probation for a defendant’s commission of a criminal act in violation of probation. “All that is required in revoking a suspended sentence is evidence which reasonably satisfies the judge in the use of his sound discretion that a condition of probation has been willfully violated.” *State v. Monroe*, 83 N.C. App. 143, 145, 349 S.E.2d 315, 317 (1986); *see also State v. Debnam*, 23 N.C. App. 478, 480, 209 S.E.2d 409, 410 (1974) (holding that the trial court may revoke probation based upon its own independent review of the facts surrounding an alleged crime even if a formal trial on the matter did not result in a guilty judgment). The record does not show why Defendant’s probation hearing was not held in June 2017, or, in any event, at some time prior to the expiration of Defendant’s probation in January 2018. Therefore, we vacate the trial court’s judgments revoking Defendant’s probation without remand. *Bryant*, 361 N.C. at 101, 637 S.E.2d at 534 (vacating without remand judgment revoking the defendant’s probation after its expiration because the trial court made no finding that good cause existed, the court failed to hold the probation hearing on an earlier scheduled date, and “the record fail[ed] to disclose any specific reason for this failure”).

III. Conclusion

We hold that the trial court did not commit plain error by allowing Chancey to offer her expert opinion that the substance the informant received from Defendant was methamphetamine. We hold that the trial court erred by not making the required finding that good cause existed to revoke Defendant’s probation after his probation period had expired. Because the record contains no evidence that the State made reasonable efforts to conduct the revocation hearing at a sooner date, we vacate the trial court’s judgments revoking Defendant’s probation.

NO PLAIN ERROR IN PART, VACATED IN PART.

Chief Judge McGEE concurs.

Judge BERGER concurs by separate opinion.

BERGER, Judge, concurring in separate opinion.

I concur in result only as to both issues.

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Specifically, to the issue of Defendant's probation violation, I disagree with the majority that the record contains "no evidence" of reasonable efforts. Admittedly, the record does not contain court calendars, motions to continue, or orders for arrest that would aid this Court's review. Also, there is no notice of hearing or other evidence in the record that Defendant sought an earlier hearing on the probation violations.

However, there is some evidence in the record of reasonable efforts such that remand for additional findings would be appropriate. *See State v. Morgan*, 372 N.C. 609, 618, 831 S.E.2d 254, 260 (2019) (remanding for additional findings appropriate where some "evidence exists that would allow the trial court on remand to make a finding of 'good cause shown and stated'[.]")

Here, Defendant was served with probation violations on April 10, 2017. Defendant was alleged to have violated the terms and conditions of his probation by committing the criminal offense of possession of methamphetamine in Yancey County on February 15, 2017. Defendant was charged with possession of methamphetamine on May 15, 2017, in Yancey County File Number 17 CR 50260. On November 27, 2017, Defendant was indicted for attaining habitual felon status and multiple drug charges, including possession of methamphetamine, in Yancey County File Number 17 CRS 50260.

The record indicates that Defendant was initially appointed an attorney, but subsequently retained private counsel. Defendant's counsel made a general appearance on the criminal charges and probation violation on or about June 26, 2018, although the Notice of General Appearance in the record contains no file stamp. Defendant waived appointed counsel on July 9, 2018.

Defendant's criminal matters, including 17 CRS 50260, came on for trial in March 2019. Following his conviction of the underlying drug offenses, including 17 CRS 50260, Defendant pleaded guilty to attaining habitual felon status. The State and Defendant announced to the trial court at sentencing that the two sides had an agreement concerning Defendant's probation violations. The agreement was that the sentences for Defendant's probation violations would run concurrently with the habitual felon sentence. This agreement between the State and Defendant is some evidence of good cause, and thus, is sufficient to remand to the trial court for additional findings of fact.

**VAITOVAS v. CITY OF GREENVILLE**

[271 N.C. App. 578 (2020)]

MARY SUE VAITOVAS, PLAINTIFF

v.

CITY OF GREENVILLE; PITT COUNTY BOARD OF EDUCATION; PHIL BERGER, IN HIS CAPACITY AS PRESIDENT PRO TEMPORE OF THE SENATE; AND TIM MOORE, IN HIS CAPACITY AS SPEAKER OF HOUSE OF REPRESENTATIVES, DEFENDANTS.

No. COA19-732

Filed 19 May 2020

**Appeal and Error—appellate jurisdiction—interlocutory appeal—facial challenge to statute—no ruling on State’s motion to dismiss**

In a suit challenging a state law as unconstitutional, the Court of Appeals lacked jurisdiction to hear plaintiff’s appeal from a three-judge panel’s order granting summary judgment in favor of two defendants (a city and a board of education) because the order did not dispose of the case as to all of the defendants where the State’s motion to dismiss was still outstanding.

Appeal by plaintiff from order entered 25 June 2019 by Judges Richard S. Gottlieb, William H. Coward, and Imelda J. Pate in Wake County Superior Court. Heard in the Court of Appeals 7 January 2020.

*Stam Law Firm, PLLC, by R. Daniel Gibson and Paul Stam, for plaintiff-appellant.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, by Robert J. King III, Jill R. Wilson, and Elizabeth L. Troutman, for defendants-appellees.*

DIETZ, Judge.

Plaintiff Mary Sue Vaitovas brought this facial constitutional challenge to a state law concerning automated red-light traffic cameras in the City of Greenville. Vaitovas argues that the law violates a provision of the North Carolina Constitution prohibiting local laws relating to health.

Vaitovas sued the City of Greenville and the Pitt County Board of Education, and also the State of North Carolina, through official-capacity claims against Phil Berger, the President Pro Tempore of the North

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Carolina Senate, and Tim Moore, the Speaker of the North Carolina House of Representatives.<sup>1</sup>

The trial court later transferred the case to a three-judge panel of superior court judges appointed by the Chief Justice because the allegations in the complaint are a facial constitutional challenge to a state law. N.C. Gen. Stat. § 1-267.1.

The three-judge panel then heard cross-motions for summary judgment from Vaitovas, the City of Greenville, and the Pitt County Board of Education. The court entered summary judgment in favor of Greenville and the Pitt County Board of Education and Vaitovas appealed. Vaitovas filed an appellant's brief and Greenville and the Pitt County Board of Education filed a joint appellee's brief.

At oral argument, this Court posed a relevant question: where is the State of North Carolina and what happened to Vaitovas's claims against the State? The following exchange occurred between the Court and the parties:

JUDGE DIETZ: Can I ask a quick, just procedural question. Is the State a party in this case?

COUNSEL FOR GREENVILLE: I think they were a nominal party and I'm not quite sure how they disappeared from the case . . . but they have not shown up or filed any brief. . . . They were named at the very beginning . . .

Another attorney for Greenville and the Pitt County Board of Education then provided some additional information:

COUNSEL FOR GREENVILLE: We actually went back and forth a long time about the procedure for this and they ended up taking a voluntary dismissal as to the State.

CHIEF JUDGE McGEE: The Plaintiff took a voluntary dismissal? [Motioning to Plaintiff's Counsel] You're welcome to answer.

PLAINTIFF'S COUNSEL: We took a dismissal as to the Attorney General. The State is still in it, they just apparently don't care who wins.

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1. "A suit against defendants in their official capacities, as public officials . . . is a suit against the State." *Harwood v. Johnson*, 326 N.C. 231, 238, 388 S.E.2d 439, 443 (1990).

## VAITOVAS v. CITY OF GREENVILLE

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After reviewing the record on appeal, we cannot agree that the State does not care who wins. Early in the trial court proceeding, the State moved to dismiss under Rule 12(b)(6) for failure to state a claim on which relief can be granted. The trial court entered an order on that motion providing that “Defendant Phil Berger and Tim Moore’s motion to dismiss under Rule 12(b)(6). In the Court’s discretion this motion should be reserved for a ruling by the three-judge panel appointed to this case.”

The record on appeal does not contain any indication that the three-judge panel ruled on that motion. That may explain why the State, although named in the complaint, did not appear in this appeal to defend the constitutionality of a state law.

“Ordinarily, this Court hears appeals only after entry of a final judgment that leaves nothing further to be done in the trial court.” *State v. Oakes*, 240 N.C. App. 580, 582, 771 S.E.2d 832, 834 (2015). Absent a small set of special exceptions, which must be asserted by the appellant in the opening brief, this Court lacks jurisdiction to hear an appeal from a non-final, interlocutory order. *Campbell v. Campbell*, 237 N.C. App. 1, 3, 764 S.E.2d 630, 632 (2014).

Because the challenged order entered judgment as to some, but not all, parties in this action, the appeal is interlocutory and we lack jurisdiction to consider it. *Id.* And, despite this Court signaling its concern at oral argument, Plaintiff has not petitioned for a writ of certiorari so that the Court can exercise appellate jurisdiction despite the appeal’s interlocutory nature.

The jurisdictional rules governing appealability of final judgments are mandatory even in routine cases. *Id.* But here, we are particularly sensitive to the consequences of a potentially “piecemeal” interlocutory appeal. *Veazey v. City of Durham*, 231 N.C. 357, 363, 57 S.E.2d 377, 382 (1950). This lawsuit is a facial constitutional challenge to a state law that names the State as a party. Before this Court hears the matter and addresses the constitutionality of that law on the merits, the appeal should include a judgment entered as to the State, so that the State, if it chooses, can appear and advocate for its position on that constitutional question.

Accordingly, we dismiss this appeal for lack of appellate jurisdiction.

DISMISSED.

Chief Judge McGEE and Judge YOUNG concur.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 MAY 2020)

BRIM v. HARRIS TEETER No. 19-1044	N.C. Industrial Commission (16-031771)	Affirmed
BRUNSON v. OFF. OF THE MAGISTRATE FOR THE 12TH JUD. DIST. No. 19-216	N.C. Industrial Commission (TA-26049) (TA-26050) (TA-26051)	Affirmed
IN RE B.G.M. No. 19-768	Surry (19JA11)	Vacated and Remanded
IN RE B.W.B. No. 19-924	Rowan (18JB169)	Affirmed
IN RE FORECLOSURE OF DAVIS No. 19-1056	Forsyth (16SP1525)	Reversed
IN RE H.B. No. 19-624	Moore (18JB26)	Vacated and Remanded
NGUYEN v. HELLER No. 19-648	Wake (10CVD19466)	Remanded
RISEN v. RISEN No. 19-342	Guilford (06CVD11417)	Reversed
SORGI v. WILKINS No. 19-916	Orange (13CVD415)	Reversed and Remanded
SPRING LAKE FARM, LLC v. SPRING LAKE FARM HOMEOWNERS ASS'N, INC. No. 19-892	Forsyth (16CVS7879)	Affirmed
STATE v. BAKER No. 19-1039	Harnett (16CRS53766)	No Error
STATE v. BYERS No. 18-863	Cleveland (14CRS52168) (14CRS52171)	No prejudicial error
STATE v. CHAMBERLAIN No. 19-565	Alamance (16CRS55304) (16CRS55371)	No Error

STATE v. CLAYTON No. 19-401	Durham (13CRS53804) (13CRS53806) (16CRS2274) (16CRS2275)	No Error in Part; Dismissed in Part
STATE v. DOUGLAS No. 19-320	Mecklenburg (17CRS21112-14) (17CRS21116-17)	No Error
STATE v. GREEN No. 19-531	Iredell (18CR51013)	No prejudicial error
STATE v. HARRISON No. 19-818	Mecklenburg (14CRS248254) (17CRS17726)	No Error
STATE v. HARTGROVE No. 19-647	Stokes (18CRS50040)	No prejudicial error.
STATE v. JACKSON No. 19-832	Madison (18CRS50197) (19CRS8)	No Error
STATE v. JOHNSON No. 19-840	Wake (18CRS201830)	No Error in Part; No Plain Error in Part; Dismissed in Part
STATE v. KELLER No. 19-538	Martin (16CRS50527-28) (17CRS12-14)	No Error
STATE v. KING No. 19-1084	Dare (17CRS51424-25)	NO ERROR IN PART; VACATED AND REMANDED IN PART
STATE v. LEWIS No. 19-994	Onslow (17CRS055168)	No Error
STATE v. McGREGOR No. 19-1010	Onslow (16CRS57444)	No Error
STATE v. McLEAN No. 19-904	Wake (02CRS105413)	Affirmed
STATE v. SANDERS No. 19-268	Lenoir (15CRS51795)	No Error



STATE v. SEAGLE No. 19-670	Catawba (15CRS5016-17) (18CRS3249)	No Error
STATE v. WATSON No. 18-1254	Guilford (16CRS92606) (16CRS92616) (17CRS24032)	No Error
WATAUGA CNTY. DEP'T OF SOC. SERVS. v. DILLARD No. 19-825	Watauga (18CVD168)	Affirmed in part, vacated and remanded in part.

**GARY v. WIGLEY**

[271 N.C. App. 584 (2020)]

NAKESHA ALLEA GARY, PLAINTIFF

v.

LINDA MARIE WIGLEY, DEFENDANT

No. COA19-998

Filed 2 June 2020

**Civil Procedure—summary judgment—mandatory notice of hearing—waiver**

Summary judgment in favor of defendant in a motor vehicle negligence action was reversed where defendant made an oral motion for summary judgment at a pretrial hearing for motions in limine but had not filed a written motion or served a notice of hearing at least 10 days in advance, as required by Civil Procedure Rule 56(c), and where plaintiff had not impliedly waived the mandatory 10-day notice requirement by participating in the motions in limine hearing.

Appeal by plaintiff from order entered 9 August 2019 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 13 May 2020.

*Sellers, Ayers, Dortch & Lyons, P.A., by Brett Dressler, for plaintiff-appellant.*

*Gaylord Rodgers, PLLC, by Dwight G. Rodgers, Jr., for defendant-appellee.*

TYSON, Judge.

Nakesha Allea Gary (“Plaintiff”) appeals from the trial court’s order granting summary judgment in favor of Linda Marie Wigley (“Defendant”). We reverse and remand.

**I. Background**

Plaintiff was allegedly injured in a motor vehicle accident with Defendant on 21 December 2017. Plaintiff was transported for emergency care following the incident and underwent a CT scan and other procedures. Plaintiff filed suit against Defendant on 19 March 2018, alleging negligence and seeking compensatory damages. Defendant filed her answer, alleged contributory negligence by Plaintiff as an affirmative defense, and asserted a counterclaim against Plaintiff for negligence and damages.

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This case was scheduled first on the trial calendar for 5 August 2019. The trial court initially heard arguments on both parties' pretrial motions *in limine*. Defendant's counsel asserted Plaintiff did not include any expert medical witnesses in her pretrial witness disclosure. Defendant moved, *inter alia*, to exclude Plaintiff from testifying about her alleged injuries and medical bills until she presented expert medical testimony about causation.

Plaintiff's counsel asserted Plaintiff could testify to her layperson's experience of her accident, injuries, and medical treatment, and introduce into evidence her medical bills detailing treatment, costs, and damages. The trial court asked both parties to present a forecast of their evidence.

The trial court stated: "I'll give it some thought." Following further statements by counsel for both parties, the trial court went off the record for seven minutes. Upon resuming the record, the trial court announced:

Yes. Just let the record reflect that counsel for the defense has made a Motion For Summary Judgment. He's made that motion because the medical records will not come into evidence in this case, nor will a medical expert testify in this case.

Counsel for the defense has stated that the plaintiff's case, therefore, lacks a crucial element, there being proximate cause, and counsel for – and the court has allowed Defendant's Motion For Summary Judgment, and it notes plaintiff's exception.

Plaintiff's counsel requested the trial court to continue the case so a better record could be created. The trial court denied the request. Plaintiff's counsel then objected "to the procedure under Rule 56 for lack of notice" and "because no evidence has been presented by defendant in support of its motion." The trial court noted Plaintiff's objections.

The trial court filed its order granting Defendant's motion for summary judgment on 9 August 2019. Plaintiff timely filed her notice of appeal.

**II. Jurisdiction**

An appeal of right lies with this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2019).

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III. Issue

Plaintiff argues the trial court erred when it granted summary judgment in favor of Defendant without statutorily-required prior notice or competent evidence.

IV. Standard of Review

North Carolina Rule of Civil Procedure 56(c) allows a moving party to obtain summary judgment upon demonstrating that “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits” show that they are “entitled to a judgment as a matter of law” and “that there is no genuine issue as to any material fact.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2019).

A genuine issue is one supported by evidence that would “persuade a reasonable mind to accept a conclusion.” *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). “An issue is material if the facts alleged would . . . affect the result of the action.” *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

“The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact.” *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citation omitted). “This burden may be met by proving that an essential element of the opposing party’s claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.” *Id.* (citation and internal quotation marks omitted).

When reviewing the evidence at summary judgment, “[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.” *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted). On appeal, “[t]he standard of review for summary judgment is de novo.” *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

V. Analysis

Plaintiff argues the trial court committed reversible error by granting Defendant’s motion for summary judgment without adequate prior notice. As required under the statute, a motion for summary judgment “shall be served at least 10 days before the time fixed for the hearing.”

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N.C. Gen. Stat. § 1A-1, Rule 56(c). “Although Rule 56 makes no direct reference to *notice of hearing* [for a summary judgment motion], this Court has held that such notice also must be given at least ten (10) days prior to the hearing.” *Barnett v. King*, 134 N.C. App. 348, 350, 517 S.E.2d 397, 399 (1999) (emphasis supplied).

“Failure to comply with this mandatory 10 day [sic] notice requirement will ordinarily result in reversal of summary judgment obtained by the party violating the rule.” *Zimmerman’s Dept. Store v. Shipper’s Freight Lines*, 67 N.C. App. 556, 557-58, 313 S.E.2d 252, 253 (1984) (citation omitted). In this case, Defendant had neither filed a motion for summary judgment before the hearing nor filed supporting affidavits. Defendant does not dispute she failed to comply with the mandatory 10-day notice requirement of Rule 56(c).

Defendant instead argues Plaintiff impliedly waived the 10-day notice requirement. “The 10-day notice required by Rule 56 can be waived by a party.” *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 667, 248 S.E.2d 904, 907 (1978). In *Raintree*, this Court held a party had waived the 10-day notice requirement by, *inter alia*, participating in oral arguments, entering into a stipulation of facts, responding in writing, and neither making a timely objection to the hearing nor requesting a continuance. *Id.*

Defendant argues Plaintiff impliedly waived the notice requirement by participating in the hearing on the motions *in limine*, reciting to the trial court the nature of the incident and Plaintiff’s claimed injuries, not requesting a continuance or additional time to produce evidence, not arguing prejudice by the lack of adequate notice, and requesting an opportunity by the trial court to create a fuller record following the trial court’s order.

Plaintiff objected to the summary judgment procedure and specified the lack of adequate prior notice under Rule 56, once the trial court resumed its hearing on the record. Plaintiff also requested additional time and opportunity to create a more detailed record. Plaintiff did not impliedly waive the notice requirement of Rule 56(c). Defendant’s reliance on *Raintree* and the alleged similarities between that case and present case is misplaced.

We also note the facts in *Raintree* involved a motion to dismiss pursuant to Rule 12(b)(6), which was converted to a motion for summary judgment under Rule 56(c) when the parties presented matters outside the pleadings. *Id.* at 667, 248 S.E.2d at 906. This Court has repeatedly held the statutory notice requirement of Rule 56(c) is mandatory when

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a motion to dismiss under Rule 12 is converted to a motion for summary judgment under Rule 56. *See id.*; *see also Locus v. Fayetteville State Univ.*, 102 N.C. App. 522, 528, 402 S.E.2d 862, 866 (1991); *In re Will of Edgerton*, 26 N.C. App. 471, 474, 216 S.E.2d 476, 478-79 (1975).

Summary judgment “provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue.” *Edgerton*, 26 N.C. App. at 474, 216 S.E.2d at 478 (citations omitted). Our Supreme Court has stated: “It is only in exceptional negligence cases that summary judgment is appropriate.” *Page v. Sloan*, 281 N.C. 697, 706, 190 S.E.2d 189, 194 (1972) (citations omitted).

Plaintiff cites *Buckner v. TigerSwan, Inc.*, where this Court held the entry of summary judgment was reversible error under Rule 56(c) when the parties only had notice they were participating in a hearing on a motion *in limine*. *Buckner v. TigerSwan, Inc.*, 244 N.C. App. 385, 389, 781 S.E.2d 494, 498 (2015). In *Buckner*, the trial court scheduled arguments on the plaintiff’s motion *in limine* related to the defendant’s counterclaims. *Id.* at 386, 781 S.E.2d at 496. During the hearing, the defendant informed the plaintiff it was dismissing its counterclaims. *Id.*

After the voluntary dismissal, the trial court heard statements of each party’s position. *Id.* at 387, 781 S.E.2d at 496. The trial court requested each side to forecast its evidence for the record, then entered summary judgment *sua sponte* in favor of the plaintiff. *Id.* This Court held the trial court erred because the defendant had not been provided the requisite 10-day notice under Rule 56(c). *Id.* at 389, 781 S.E.2d at 498.

Here, the case was scheduled as first on the trial calendar. While the case at bar similarly deals with a hearing on motions *in limine*, the pretrial hearing in *Buckner* was not on the same day the case was scheduled to be tried. Parties appearing in court for trial are on notice to be prepared to go forward for final disposition of their claims.

Nevertheless, “cautious observance” of the statutory notice requirements of Rule 56(c) mandates reversal of the trial court’s grant of summary judgment, due to insufficient notice. *Edgerton*, 26 N.C. App. at 474, 216 S.E.2d at 478; *see also Wachovia Mortg., FSB v. Davis*, 209 N.C. App. 752, 709 S.E.2d 602, 2011 WL 531796, at \*2 (2011) (unpublished) (notice requirement of Rule 56(c) not followed even where notice of hearing filed and served nearly two months after notice of motion, and notice of hearing “indicated [the] motion would be heard ‘at the time the matter [wa]s called for trial’ eight days later.”).

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“Since the procedure prescribed by Rule 56 was not followed, the judgment appealed from is erroneous.” *Buckner*, 244 N.C. App. at 389, 781 S.E.2d at 497 (citations omitted). We do not reach and express no opinion on the merits, if any, of the parties’ allegations, claims, or defenses.

VI. Conclusion

Defendant had not filed the required 10-day prior notice of a motion for summary judgment before the hearing on the parties’ motions *in limine*. Plaintiff did not impliedly waive the 10-day notice requirement of Rule 56(c) through her counsel’s participation in the hearing on the motions *in limine*. The trial court erred by granting summary judgment in favor of Defendant without the requisite 10-day prior notice. *See id.* We reverse the trial court’s grant of summary judgment and remand for further proceedings.

Because we reverse the trial court’s order and remand due to inadequate prior notice, we do not reach and express no opinion on the merits, if any, of the parties’ allegations, claims, or defenses. *It is so ordered.*

REVERSED AND REMANDED.

Judges DIETZ and ARROWOOD concur.

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IN THE MATTER OF THE APPEAL OF HARRIS TEETER, LLC, APPELLANT  
FROM THE DECISION OF THE MECKLENBURG COUNTY BOARD OF EQUALIZATION AND REVIEW

No. COA19-927

Filed 2 June 2020

**1. Taxation—appeal to Property Tax Commission—non-attorney’s submission of forms—scrivener’s exception to practice of law**

A business taxpayer’s appeal to the Property Tax Commission, which was filed by a non-attorney employee, was not subject to dismissal for lack of jurisdiction because the statute requiring notice of non-attorney representation (N.C.G.S. § 105-290(d2)) was not triggered by the filing of the notice of appeal and application for hearing. Production of those forms, which involved filling in blank spaces on standardized forms with basic information and with no need for the exercise of legal judgment, constituted a scrivener’s

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exception to the practice of law and did not constitute an appearance before the Commission.

**2. Taxation—ad valorem taxes—presumption of validity—rebuttal by taxpayer—sufficiency of evidence**

In a challenge to a county's ad valorem property tax valuation of business taxpayer's equipment, the Property Tax Commission properly determined that the taxpayer's evidence—in the form of an expert appraiser's report and testimony—rebutted the presumption of validity of that valuation by demonstrating that the county's appraisal methodology did not reflect the equipment's true value.

**3. Taxation—ad valorem taxes—appraisal methodology—cost approach—true value—evidentiary support**

The Property Tax Commission's determination that a county's ad valorem tax valuation of a business taxpayer's equipment did not substantially exceed true value of the property was supported by its findings of fact, which were in turn based on competent evidence, including that there was no functional or economic obsolescence affecting depreciation to require additional reductions in values.

Judge TYSON concurring in the result in part and dissenting in part.

Appeal by taxpayer from Final Decision entered 30 May 2019 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 30 April 2020.

*Bell, Davis & Pitt, P.A., by John Cocklereece, Justin Hardy and Kyle F. Heuser, for Appellant Taxpayer.*

*Ruff Bond Cobb Wade & Bethune, LLP, by Ronald L. Gibson and Robert S. Adden, Jr., for Appellee Mecklenburg County.*

ARROWOOD, Judge.

Harris Teeter, LLC ("taxpayer") and Mecklenburg County ("the County") both appeal from the Final Decision of the North Carolina Property Tax Commission ("the Commission") upholding the County's 2015 *ad valorem* property tax valuation of taxpayer's personal property. For the following reasons, we affirm.

**I. Background**

This case arises from the County's 2015 *ad valorem* tax assessment of taxpayer's business personal property, namely, the equipment in its



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grocery stores within the county (“the property” or “the equipment”). In disagreement with the County’s assessment, taxpayer filed several Notices of Appeal and Applications for Hearing to the North Carolina Property Tax Commission. On 6 February 2019, the County moved to dismiss taxpayer’s appeal on the grounds that the signatory of taxpayer’s notices of appeal was not a proper person to represent it before the Commission. The Commission denied the County’s motion and heard the appeal on its merits at a hearing on 5 March 2019.

On appeal to the Commission, taxpayer and the County stipulated that they would present evidence regarding the equipment at six of taxpayer’s stores in Mecklenburg County that were exemplary of various store models used by taxpayer, and the resulting valuations would be extrapolated to the rest of taxpayer’s stores within the county.

Taxpayer’s evidence before the Commission included the following. Mecklenburg County Assessor Kenneth Joyner, Jr., testified regarding the process by which he reached his valuation of the property. He testified that, using the replacement cost approach to determining true value, the County assessed taxpayer’s property in these six locations at \$21,434,313.00. Considering the value of each item of equipment as part of taxpayer’s operations as a going concern, he took the original cost of the equipment as reported by taxpayer and went “into the cost index and [North Carolina Department of Revenue] depreciation schedules and identif[ied] the proper categories to apply” to the property and “us[ed] the values that come out of the original cost and . . . appl[ied] those to the trending schedules within the software to arrive at value.” He testified that he did not deviate from the values reached by application of the depreciation schedules by making any additional adjustments for other considerations. In relevant part, the Department of Revenue depreciation schedules noted that they “have been prepared . . . as a general guide to be used in the valuation of business personal property utilizing the replacement cost approach to value.” They also noted that they “are only a guide” and “[t]here may be situations where the appraiser will need to make adjustments for additional or less functional or economic obsolescence or for other factors.

Taxpayer then presented the expert testimony of its own appraiser, Mitchell Rolnick (“Mr. Rolnick”). Mr. Rolnick conducted his own assessment using the replacement cost approach and appraised the property at \$13,663,000.00. He testified that he applied his firm’s preferred depreciation schedules to the original cost of each item of equipment and then adjusted the output values from the schedules based upon actual data he derived from market sales of comparable used equipment.

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According to Mr. Rolnick, these market sales tended to show that used grocery store equipment equivalent in age and specifications to taxpayer's property sold for prices drastically below the County's appraised values. He testified that these low market prices for used grocery store equipment necessitated downward adjustment of any values produced by depreciation schedules to reflect additional economic and functional obsolescence not captured by the schedules used by the County. He testified that these further adjustments resulted in appraisal values more in line with true value.

James Turner ("Mr. Turner") testified for the County regarding why such additional depreciation adjustments were inappropriate considerations in an application of the cost approach to taxpayer's property. He noted that, during 2015, the grocery industry was in a period of consolidation marked by increased store closures. These store closures caused a glut in the supply of used grocery store equipment that drove prices down, as grocers prefer to throw away their equipment or sell it in individual units on the open market rather than sell their fully installed and operative equipment to a competitor as a going concern. He further noted that taxpayer and other grocers in the industry only bought new equipment and did not deal in the used market.

Mr. Turner stated that transactions in the used market were thus more akin to forced sales reflecting liquidation values, rather than the true value of the equipment as fully functioning and installed into an integrated and operational grocery store. He therefore opined that adjusting depreciation to reflect the low prices fetched by individual units of grocery store equipment in the used market would not produce true value, because used market transactions were not from a "willing seller" as mandated by N.C. Gen. Stat. § 105-283 (2019).

Mr. Turner testified that adjustment for depreciation additional to the rates incorporated into the depreciation schedules was inappropriate for the property. He noted that for most of taxpayer's equipment, he observed no economic or functional obsolescence that would necessitate any additional downward adjustment in value. However, he noted that he did adjust downward for certain classes of equipment quickly rendered obsolete by rapid technological advancements, such as electronic scanning equipment and computers. Furthermore, he accelerated depreciation on certain classes of equipment that taxpayer indicated it replaced on a more frequent basis than the timelines listed in the depreciation tables. Mr. Turner's independent appraisal methodology valued the property at \$22,100,00.00.

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Mr. Turner also questioned the validity of Mr. Rolnick's appraisal methodology on additional grounds. For example, he questioned Mr. Rolnick's failure to incorporate delivery and installation costs into observed market sales, which he said would overstate the depreciation of an item of equipment when compared against its original cost, which included such costs.

On 30 May 2019, the Commission rendered its Final Decision upholding the County's assessment of taxpayer's property. In its Final Decision, the Commission determined that taxpayer met its burden of producing evidence sufficient to shift the burden to the County to prove that its assessment reflected true value. The Commission concluded that the County met its burden, based on the following findings of fact.

The Commission found no evidence of functional obsolescence affecting taxpayer's property, with some exceptions accounted for in Mr. Turner's appraisal. The Commission found that the equipment in taxpayer's stores does not become functionally obsolescent due to periodic renovations of each store. The Commission also "[ou]nd no evidence in the record to suggest that the equipment in question (collectively) is failing to perform adequately the job for which it was intended due to design or economic factors."

Furthermore, the Commission found that economic obsolescence did not affect the property. The Commission found that both appraisal experts utilized the cost approach to appraise taxpayer's property because the sales comparison approach would not be viable without significant adjustment. Yet, Mr. Rolnick's methodology relied upon sales of used equipment without any adjustments to develop his schedules for calculating the level of depreciation applicable to the equipment. The Commission found it "illogical to determine that sales are too unreliable to be useful in developing value using the sales comparison approach, but then to use the same or similar sales, directly and without adjustment, under the cost approach to determine the appropriate level of depreciation to apply to original installed cost in order to arrive at current, true value."

The Commission also found that the market prices for used grocery store equipment in the secondary market were an inappropriate consideration for economic obsolescence, based on the following finding:

[W]e struggle to accept the argument that the market for new, installed equipment is the same as the market for used, uninstalled equipment that has been effectively discarded through store closures or even remodels.

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Clearly, the Appellant has chosen the new product over the old for a reason; if the used equipment were truly the equivalent of the new, there would be no rational reason to incur the removal and installation costs of a remodel. And, given that the options for used equipment disposal are either to trash it or sell it, it is reasonable to conclude that the marketplace for used equipment, even at the upper end of sales, is closer to a liquidation value for the equipment than to the true value of installed, adequately functioning equipment.

The Commission also found that, even if the secondary market provided relevant information for sales of equipment comparable to taxpayer's property, taxpayer's suggested appraisal methodology using such sales for downward adjustment of value was improper because it failed to consider delivery and installation costs not built into the prices fetched in the secondary market, thus inflating depreciation estimates derived from a comparison to original costs including delivery and installation.

Accordingly, the Commission found "that all or nearly all of the depreciation affecting the subject property is the result of physical deterioration . . . . As the parties [were] in substantial agreement that physical deterioration has been captured in the county's valuation of the assets," the Commission thus found that Mr. Turner's appraisal supported the County's valuation and was a reasonable estimate of true value.

## II. Discussion

Taxpayer and the County both challenge the Commission's Final Decision on multiple grounds. The County argues that the Commission erred by denying its motion to dismiss the appeal before it and improperly concluding that taxpayer put forth evidence at the hearing sufficient to shift the burden to the County to prove that its valuation produced true value. Taxpayer argues that the Commission erred by making findings not supported by competent evidence, which in turn did not support its conclusion of law that the County satisfied its shifted burden. Addressing each in turn, we are unpersuaded by these arguments and affirm the Commission's Final Decision.

### A. Standard of Review

"Because the controlling issue in this case is whether the Commission properly accepted [the] County's method of valuing [taxpayer's property] rather than the method offered by taxpayer, we use

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the whole-record test to evaluate the conflicting evidence.” *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003); *see also* N.C. Gen. Stat. § 105-345.2(c) (2019).<sup>1</sup>

The “whole record” test does not allow the reviewing court to replace the [Commission’s] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, the “whole record” rule requires the court, in determining the substantiality of evidence supporting the [Commission’s] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission’s] evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the [Commission’s] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

*In re Parkdale Mills*, 225 N.C. App. 713, 716, 741 S.E.2d 416, 419 (2013) (alterations in original) (citation omitted). “The ‘whole record’ test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.” *In re McElwee*, 304 N.C. 68, 87, 283 S.E.2d 115, 127 (1981) (internal quotation marks and citation omitted).

B. Motion to Dismiss

[1] As an initial matter, the County asserts that the Commission erred in denying its motion to dismiss taxpayer’s appeal. The County argues that N.C. Gen. Stat. § 105-290(d2) (2019) precludes taxpayer from using an employee listed as its “director of financial support” from filing the Notice of Appeal and Application for Hearing from the County’s tax assessment, because filing this form constitutes the practice of law and the employee was not one of the enumerated nonattorney representatives authorized by N.C. Gen. Stat. § 105-290(d2) to represent a corporation before the Commission. We hold that filing the notice of appeal form constitutes neither an “appearance” before the Commission nor the practice of law. Thus, we do not reach the issue of whether taxpayer’s

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1. Although the dissent correctly notes that the Commission’s conclusions of law receive *de novo* review, the ultimate determination that one of multiple competing appraisal methodologies produced true value is a finding of fact subject to review under the whole record standard. *In re Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319 (citation omitted).

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director of financial support was a person authorized to represent it before the Commission.

N.C. Gen. Stat. § 105-290(d2) provides the following restriction on who may represent a taxpayer in proceedings before the Commission:

If a property owner is a business entity, the business entity may represent itself using a nonattorney representative who is one or more of the following of the business entity: (i) officer, (ii) manager or member-manager, if the business entity is a limited liability company, (iii) employee whose income is reported on IRS Form W-2, if the business entity authorizes the representation in writing, or (iv) owner of the business entity, if the business entity authorizes the representation in writing and if the owner's interest in the business entity is at least twenty-five percent (25%). Authority for and prior notice of nonattorney representation shall be made in writing, under penalty of perjury, to the Commission on a form provided by the Commission.

The County contends that filing the Notice of Appeal and Application for Hearing form with the Commission falls within the scope of this mandate, and therefore taxpayer's failure to provide notice of nonattorney representation for its financial director's filing of the form was a jurisdictional bar compelling dismissal of taxpayer's appeal. *See* 17 N.C.A.C. 11.0216(a) (2020) ("[Business entities] appearing before the Property Tax Commission . . . shall be represented by an attorney licensed to practice law in North Carolina, except as provided for in G.S. 105-290(d2). This requirement shall not be waived by the Commission. Notice of nonattorney representation pursuant to G.S. 105-290(d2) shall be filed with the Commission within 30 days of filing a Notice of Appeal or the appeal shall be subject to dismissal."). Unlike the dissent, we interpret this language as establishing a jurisdictional requirement for hearings before the Commission. Notice of nonattorney representation "*shall be made . . . to the Commission on a form provided by the Commission.*" N.C. Gen. Stat. § 105-290(d2) (emphasis added). This notice "*shall be filed with the Commission . . . or the appeal shall be subject to dismissal.*" 17 N.C.A.C. 11.0216(a) (emphasis added). The dissent cites no law for its proposition that this requirement may be subject to waiver by the mere passage of time.

The dissent asserts that the act of filing the Notice of Appeal and Application for Hearing form constitutes the practice of law. Yet, the dissent believes that taxpayer's failure to provide notice of nonattorney

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representation therefore was cured by attorney representation at a later stage in the proceedings. We cannot reconcile these positions.

We do not believe that filing the Notice of Appeal and Application for Hearing constitutes an appearance or legal representation requiring notice under N.C. Gen. Stat. § 105-290(d2). Nor does it violate the general purpose of North Carolina's prohibition on the corporate practice of law.

Nonattorney representation is the practice of law by someone unauthorized to do so in this State.

The phrase "practice law" . . . is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including . . . the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation . . . .

N.C. Gen. Stat. § 84-2.1 (2019).

Though we have not yet had occasion to address the matter, our lower courts and courts in other jurisdictions have on previous occasions noted a "scrivener's exception" to this definition of practicing law. *See LegalZoom.com, Inc. v. North Carolina State Bar*, No. 11 CVS 1511, 2014 WL 1213242, at \*12-14 (N.C. Super. Mar. 24, 2014) (recognizing applicability of scrivener's exception to some practices of LegalZoom in entering customer information into standard forms); *North Carolina State Bar v. Lienguard, Inc.*, No. 11 CVS 7288, 2014 WL 1365418, at \*10-11 (N.C. Super. Apr. 4, 2014) (holding scrivener's exception inapplicable where entry of information into form required exercise of legal judgment); *Medlock v. LegalZoom.com, Inc.*, No. 2012-208067, 2013 S.C. LEXIS 362, at \*22-23, \*26-27 (Sup. Ct. S.C. 2013) (holding LegalZoom's preparation of legal forms by merely entering information provided by customer did not constitute practice of law); *see also Lola v. Skadden, Arps, Slate, Meagher & Flom, LLP*, 620 F. App'x 37, 44-45 (2d Cir. 2015) (holding no practice of law in document review if law firm's review protocol allowed attorney no exercise of judgment or discretion). In *LegalZoom.com, Inc. v. North Carolina State Bar*, the North Carolina Business Court described the scrivener's exception as one where "unlicensed individuals may record information that another provides without engaging in [the unauthorized practice of law] as long as they do not



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also provide advice or express legal judgments.” 2014 WL 1213242 at \*12-13 (citing *In re Graham*, Nos. 02-81930C-7D, 02-82065C-7D, 2004 WL 1052963 (Bankr. M.D.N.C. Feb. 13, 2004) (recognizing scrivener’s exception in federal bankruptcy court; holding exception inapplicable where defendant provided legal advice in addition to assistance in filling out forms), *aff’d*, Nos. 1:04CV0796, 1:04CV0797, 2005 WL 1719934 (M.D.N.C. Apr. 14, 2005); *In re Lazarus*, No. 05-80274C-7D, 2005 Bankr.LEXIS 1093, 2005 WL 1287634 (Bankr. M.D.N.C. Mar. 14, 2005)).

Although it did not expressly recognize the scrivener’s exception, we find our reasoning in *Duke Power Co. v. Daniels* persuasive in the instant case. 86 N.C. App. 469, 358 S.E.2d 87 (1987). In *Duke Power Co.*, we held that a company employee did not engage in the unauthorized practice of law by filing a complaint on behalf of the company in small claims court. *Id.* at 471-72, 358 S.E.2d at 89. We reasoned that “we do not believe that a corporation that merely fills in and signs one of the simple complaint forms that the General Assembly itself devised, [N.C. Gen. Stat. §] 7A-232, and that our clerks of court regularly supply to prospective plaintiffs in small claims actions, is practicing law within the contemplation of [N.C. Gen. Stat. §] 84-5, the main purpose of which is to prohibit corporations from performing legal services for *others*. [Furthermore], even if such an innocuous act is deemed to technically violate the statute, it is not of such gravity, in our opinion, as to deprive the court of jurisdiction and justify the dismissal of plaintiff’s action.” *Id.* at 472, 358 S.E.2d at 89 (emphasis in original).

The procedures established by our legislature for actions in small claims court are different than those for an administrative appeal before the Commission. Nonetheless, we find this reasoning persuasive. Here, the Notice of Appeal and Application for Hearing form requires a mere handful of blanks to be filled in by the petitioner relating to the name and contact information of the appellant, the address of the property subject to the appeal, and the date of the decision appealed from. Moreover, the director of financial support filed the form on behalf of taxpayer as his employing corporation, rather than for another person or entity. Thus, our concern for protecting others from the corporate practice of law on their behalf is also inapplicable.

We do not find the dissent’s reliance on *State v. Cash*, 270 N.C. App. 433, 841 S.E.2d 589, 2020, persuasive or pertinent to the facts of the instant case. In *Cash*, this Court held that the preparation and filing of a motion to set aside bail bond forfeiture pursuant to N.C. Gen. Stat. § 15A-544.5 (2019) constituted the practice of law. *Id.* at 437, 841 S.E.2d at 591. This statute enumerates seven specific factual



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scenarios in which a bond forfeiture may be set aside upon motion. N.C. Gen. Stat. § 15A-544.5(b)(1)-(7). Drafting such a motion requires the exercise of legal judgment to determine if any of the seven specified circumstances apply to the situation then before the court. Thus, the filing of a motion to set aside bond forfeiture falls outside the scrivener's exception articulated by our lower courts and is distinguishable from the facts before us in *Duke Power Co.*

Without opining on the full extent of its potential scope, we find the scrivener's exception to the practice of law applicable in the instant case. Taxpayer's director of financial support filled out a handful of blanks on a standardized, fill-in-the-blank appeal form and filed it with the Commission. The information he furnished on the form included no more than the basic details about the property tax assessment from which taxpayer sought appeal. Filling in these basic details into a standard form required no exercise of legal judgment. Moreover, taxpayer was represented by a licensed attorney at the hearing before the Commission. Therefore, we do not believe that taxpayer availed itself of nonattorney representation before the Commission requiring notice under N.C. Gen. Stat. § 105-290(d2). The Commission did not err in denying the County's motion to dismiss.

C. Substantive Challenges to Final Decision

Taxpayer and the County both argue that the Commission erred in its application of the evidentiary standard applicable to challenges of *ad valorem* tax assessments. We disagree on both accounts.

"[A]d valorem tax assessments are presumed to be correct." *In re AMP, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975).

Of course, the presumption is only one of fact and is therefore rebuttable. But, in order for the taxpayer to rebut the presumption he must produce 'competent, material and substantial' evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of valuation; AND (3) the assessment *substantially* exceeded the true value in money of the property. Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money

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of the property assessed, i.e., that the valuation was *unreasonably* high.

*Id.* at 563, 215 S.E.2d at 762 (emphasis in original) (internal citations omitted). A property valuation methodology is arbitrary and illegal if it fails to produce “true value” as defined in N.C. Gen. Stat. § 105-283 (2019). *In re Blue Ridge Mall, LLC*, 214 N.C. App. 263, 269, 713 S.E.2d 779, 784 (2011) (citation omitted).

All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words “true value” shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283. “In attempting to rebut the presumption of correctness, the burden upon the aggrieved taxpayer is one of production and not persuasion.” *In re Blue Ridge Mall, LLC*, 214 N.C. App. at 267, 713 S.E.2d at 782 (internal quotation marks and citation omitted). “[I]f the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values.” *In re Parkdale Mills*, 225 N.C. App. at 717, 741 S.E.2d at 420 (citation omitted).

1. Taxpayer Rebutted Presumption of Validity

[2] The County argues that the Commission erred in its Final Decision by concluding that taxpayer had rebutted the presumption of validity for the County’s valuation of its personal property. We disagree.

Taxpayer presented expert testimony from Mr. Rolnick, an appraiser of business personal property. Mr. Rolnick conducted his own valuation of taxpayer’s personal property, which was reduced to an extensive report submitted into evidence at the hearing. This report and Mr. Rolnick’s testimony tended to show that a proper valuation for the property under the cost approach to property appraisal was \$13,663,000.00, \$7,771,313.00 lower than the County’s valuation of \$21,434,313.00. Mr. Rolnick testified that this discrepancy was due to his adjustment for economic and functional obsolescence in taxpayer’s equipment, derived from research into comparable market transactions. He stated that the

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County's failure to account for additional observed depreciation after inputting the property's original cost into the depreciation schedules resulted in a valuation that did not reflect true value.

Therefore, competent evidence supported the Commission's determination that taxpayer met its burden to produce evidence that the County's appraisal methodology did not produce true value, and shifted the evidentiary burden to the County to show otherwise. Assuming *arguendo* that taxpayer's evidence was insufficient to shift the evidentiary burden to the County, it was not prejudiced thereby. The Commission ultimately concluded that the County met its shifted burden by showing why its application of the cost approach resulted in an appraisal reflecting true value. *See* N.C. Gen. Stat. § 105-345.2(c) (applying rule of prejudicial error to Commission's decisions).

2. The County's Evidence Met Its Shifted Burden

[3] Taxpayer argues that the Commission erred in its Final Decision by making findings unsupported by competent evidence and concluding as a matter of law that the County put forth evidence sufficient to meet its shifted burden to prove that its appraisal methodology produced true value. We disagree.

Once a taxpayer has rebutted the presumption of validity and the county puts forth evidence supporting its appraisal as reflective of the true value of the subject property,

[t]he critical inquiry . . . [becomes] whether the County's appraisal methodology is the proper means or methodology given the characteristics of the property under appraisal to produce a true value or fair market value. To determine the appropriate appraisal methodology under the given circumstances, the Commission must hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the [County] met its burden.

*In re Parkdale Mills*, 225 N.C. App. at 717, 741 S.E.2d at 420 (internal quotation marks and citation omitted).

In the instant case, both taxpayer and the County agree generally that the cost approach was the appropriate appraisal methodology for taxpayer's personal property. "The cost approach commonly measures value by estimating the current cost of a new asset, then deducting for

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various elements of depreciation, including physical deterioration and functional and external obsolescence to arrive at ‘depreciated cost new.’ The ‘cost’ may be either reproduction or replacement costs. The logic behind this method is that an indication of value of the asset is its cost (reproduction or replacement) less a charge against various forms of obsolescence such as functional, technological and economic as well as physical deterioration if any.” *In re IBM Credit Corp.*, 201 N.C. App. 343, 351, 689 S.E.2d 487, 493 (2009).

Furthermore, the parties agree that widely accepted depreciation schedules used in the appraisal profession should be applied to determine the degree to which the property’s current value has decreased since taxpayer bore the original costs of acquiring it and putting it to use. However, the parties disagree concerning the degree to which functional and economic obsolescence should be considered and used to further adjust appraisal values for additional depreciation after application of depreciation schedules.

Part of the cost approach is deducting for depreciation, which is a loss of utility and, hence, value from any cause . . . [representing] the difference between cost new on the date of appraisal and present market value. Depreciation may be caused by deterioration, which is a physical impairment, such as structural defects, or by obsolescence, which is an impairment of desirability or usefulness brought about by changes in design standards (*functional obsolescence*) or factors external to the property (*economic obsolescence*).

*In re Appeal of Stroh Brewery*, 116 N.C. App. 178, 186, 447 S.E.2d 803, 807 (1994) (ellipses and emphasis in original) (internal quotation marks and citations omitted).

The crux of taxpayer’s argument on appeal is that the Commission erred by finding as fact that functional and economic obsolescence did not affect its property, and were therefore inappropriate to apply in any downward adjustment of the values reached from application of the depreciation schedules. Accordingly, taxpayer argues that the Commission’s failure to recognize the need for downward adjustment of values produced by the depreciation schedules is fatal to its conclusion of law that the County’s assessment did not reflect true value of taxpayer’s property. We are not convinced. The Final Decision’s findings of fact, discussed *infra*, are supported by competent evidence, adequately explain why additional downward adjustment of values to

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reflect functional and economic obsolescence was inappropriate, and support the Commission's conclusion of law that the County met its shifted burden to show that its appraisal produced true value.

a. Functional Obsolescence

We have previously defined functional obsolescence as "a loss in value due to impairment of functional capacity inherent in the property itself" including factors such as "overcapacity, inadequacy or changes in state of the art, or poor design." *In re Westmoreland-LG&E Partners*, 174 N.C. App. 692, 699, 622 S.E.2d 124, 130 (2005) (internal quotation marks, alterations, and citations omitted).

In its Final Decision, the Commission found no evidence of functional obsolescence affecting taxpayer's property, with the exception of computers and other electronic equipment, for which Mr. Turner's appraisal methodology accounted by downwardly adjusting the value produced by the depreciation schedules. The Commission also found that the equipment in taxpayer's stores does not become functionally obsolescent due to periodic renovations of each store, during which most equipment has a routine replacement schedule of approximately six years. Moreover, the Commission "f[ou]nd no evidence in the record to suggest that the equipment in question (collectively) is failing to perform adequately the job for which it was intended due to design or economic factors." Taxpayer does not dispute these findings, and they are therefore binding on appeal.

The Commission also considered functional obsolescence in the following finding:

Mr. Turner testified that he identified additional functional obsolescence in computer-based equipment and further depreciated the value of those assets in order to account for the additional loss in value. He testified that he accelerated the depreciation on certain types of equipment as a result of information he received from the Appellant's staff—that some equipment was replaced before the end of its normal useful life because of severe use of that equipment. . . . Mr. Turner testified further that he had personally developed income-based values in order to determine for himself whether the subject property was producing an appropriate return for the Appellant, and determined that the subject property produced income greater than standard for the industry. His conclusion, therefore, is that the subject property does not exhibit economic obsolescence,

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and we agree. The property's apparent capacity to generate income greater than the industry standard is not an indication of economic obsolescence.

Although this finding mistakenly refers to economic obsolescence in two instances, it is clear from a reading of the finding as a whole that it speaks to indicators of functional obsolescence. Taxpayer argues that this finding was in error because the Commission's consideration of the returns on its equipment compared to industry norms illegally weighted its subjective value to taxpayer over true value as defined in N.C. Gen. Stat. § 105-283. It further argues that its comparative performance against competitors in the industry is irrelevant to the true value of its property.

Taxpayer's argument conflates its own subjective value of its equipment with aspects of the equipment's relative performance, which are properly considered indicators of functional obsolescence. In *In re Westmoreland*, we approved of the Commission's finding of no functional obsolescence in a power company's plants where "[t]he record indicate[d] both plants ha[d] outstanding performance records, operate[d] above industry standards in production, ha[d] no environmental problems, and ha[d] been consistently profitable." 174 N.C. App. at 699-700, 622 S.E.2d at 130. Here, the Commission gave weight to evidence tending to show that taxpayer's equipment performed well compared to that of the industry as a whole, an appropriate indication that functional obsolescence did not affect the equipment. Therefore, the Commission did not err in this finding.<sup>2</sup>

b. Economic Obsolescence

Taxpayer next argues that the Commission should have given weight to the market for used grocery store equipment in evaluating whether the County's appraisal values required additional downward adjustment for economic obsolescence, and its failure to do so resulted in an erroneously negative finding on that issue. We are not convinced. The

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2. The dissent makes much of the fact that Mr. Turner's appraisal methodology adjusted values in several specific classes of equipment for observed functional obsolescence unique to those classes of equipment. It argues that this fact renders Mr. Turner's appraisal unsupportive of the County's appraisal methodology, which failed to account for these specific instances of functional obsolescence. Yet the dissent forgets that it is not enough for a taxpayer to prove that the county used an arbitrary or illegal appraisal methodology. A challenge to an *ad valorem* property tax valuation will fail in spite of an arbitrary and illegal appraisal methodology where the evidence before the Commission shows that this methodology nonetheless produced values that did not substantially exceed true value. *In re AMP*, 287 N.C. at 563, 215 S.E.2d at 762 (citation omitted).

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Commission's findings were supported by competent evidence and adequately address why consideration of the market for used grocery store equipment was inappropriate and did not warrant additional downward adjustment of the depreciation schedule values.

The Commission found that taxpayer's expert Mr. Rolnick utilized the cost approach to appraise taxpayer's property because the sales comparison approach would not be viable without significant adjustment. Yet, Mr. Rolnick relied upon sales of used equipment without any adjustments to develop his schedules for calculating the level of depreciation applicable to the equipment. The Commission found it "illogical [for Mr. Rolnick] to determine that sales are too unreliable to be useful in developing value using the sales comparison approach, but then to use the same or similar sales, directly and without adjustment, under the cost approach to determine the appropriate level of depreciation to apply to original installed cost in order to arrive at current, true value."

The Commission also found that the market prices for used grocery store equipment in the secondary market were an inappropriate consideration in part based upon the following finding:

[W]e struggle to accept the argument that the market for new, installed equipment is the same as the market for used, uninstalled equipment that has been effectively discarded through store closures or even remodels. Clearly, the Appellant has chosen the new product over the old for a reason; if the used equipment were truly the equivalent of the new, there would be no rational reason to incur the removal and installation costs of a remodel. And, given that the options for used equipment disposal are either to trash it or sell it, it is reasonable to conclude that the marketplace for used equipment, even at the upper end of sales, is closer to a liquidation value for the equipment than to the true value of installed, adequately functioning equipment.

Taxpayer argues that "[t]he Commission committed a critical error in finding as a fact that the market for used grocery store equipment was inadequate for the purpose of identifying obsolescence affecting the Property, seemingly under the mistaken belief the Property is new equipment rather than used equipment[.]" We disagree. Read as a whole, this finding's use of the word "new" is clearly in reference to "installed, adequately functioning equipment," as opposed to the older equipment taxpayer phases out of its stores during periodic remodels.



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In any event, taxpayer argues that the Commission erred by failing to find as fact that the value of its property is negatively influenced by economic obsolescence. We disagree. Implicit in the Commission's finding is its determination that, due to the prevailing industry trend of store closures flooding the supply in the secondary market for used equipment, the prices fetched by such sales do not represent transactions from "willing sellers" of the equipment as mandated by N.C. Gen. Stat. § 105-283.

"Implicit in the language and in our interpretation of [N.C. Gen. Stat. § 105-283] is the on-going entity assumption." *In re AMP*, 287 N.C. at 570, 215 S.E.2d at 766. In *In re AMP*, the taxpayer electronics manufacturer argued that its unfinished inventory and raw materials could only be sold on the scrap metal market, and therefore the county's valuation of these classes of property above scrap prices exceeded true value. *Id.* at 567-68, 215 S.E.2d at 765. We disagreed, noting that "AMP's desired interpretation of [N.C. Gen. Stat. §] 105-294 (now [N.C. Gen. Stat. §] 105-283) is based on the assumption, obviously fictional, that on 1 January of each year it is required to sell all of its inventory, whether such inventory is in raw material or in an in-process state, to the only possible buyers of such materials, the scrap mills." *Id.* at 568, 215 S.E.2d at 765. We further opined that "[i]t [was] ludicrous to assert that . . . the undamaged raw materials, which constituted approximately 82% of all the taxable property on hand [during the years in question], lost approximately sixty percent of its value upon being transferred from the delivery truck into AMP's warehouse facilities. . . . Such a contention defies all logic and common sense." *Id.* at 574, 215 S.E.2d at 769. Furthermore, we noted that the evidence showed that the taxpayer in fact never sold unfinished inventory to scrap metal purchasers. *Id.* at 570, 215 S.E.2d at 766.

Similarly, in the instant case taxpayer would have the Commission value its property as if it were not integrated into its business as a going concern. Taxpayer's suggested valuation assumes that each piece of equipment is due for replacement and headed to either the landfill or the glutted secondary market at the moment it is valued. Likewise, taxpayer's approach would result in its equipment experiencing a drastic reduction in value the moment they are purchased new and installed in its stores. Furthermore, the evidence showed that taxpayer and its industry counterparts in fact did not deal in the secondary market for grocery store equipment when buying equipment or disposing of equipment scheduled for replacement.

At any rate, the Commission also found that even if the secondary market provided relevant information for sales of equipment



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comparable to taxpayer's property, taxpayer's suggested appraisal methodology using such sales for downward adjustment of value was improper because it failed to consider delivery and installation costs not built into the prices fetched in the secondary market:

The record discloses extensive evidence that the depreciation schedules developed for the Appellant's opinion of value were not based upon sales that included the installed cost of putting the sold equipment to use. The Appellant's stated position is that, because the original installed cost includes the costs required to deliver, install, and put the original equipment to its intended use, adding those same costs to the sale prices of the sold equipment would essentially double-count installation costs and therefore overstate the sale prices and underestimate depreciation. We disagree. If the basis for determining true value under the cost approach is the total cost required to put equipment to its intended use, then a resale of used equipment must also include installation and other necessary costs in order for that sale to be useful in isolating any depreciation element. Otherwise, any difference between the installed cost of new equipment and the uninstalled cost of used equipment would reflect both depreciation and installation cost, because the used equipment in the hands of a buyer cannot be put to its intended use until it is delivered and installed.

Taxpayer argues that this finding is erroneous because "[f]air market value is the price paid by a willing buyer to a willing seller for property. N.C. Gen. Stat. § 105-283. Money paid by a hypothetical buyer to a third party for services related to acquired property is not money paid to a willing seller. By definition, including such monies would violate North Carolina's fair market value standard."

The Commission heard competent testimony supporting its assessment. Mr. Turner testified that delivery and installation costs were particularly significant for individual pieces of used grocery store equipment that function as parts of a larger integrated system. For example, a single segment of refrigerator casing in a supermarket's frozen foods section, when bought individually on the used market, would later have to be integrated with the other refrigerator casings on the aisle and connected to the refrigeration unit serving them. Thus, the mere market price of a used refrigerator casing reflected only a portion of total replacement cost. Mr. Turner testified that adding delivery and installation costs to

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sales price for new equipment to reach the original cost to taxpayer, while failing to do so for sales prices of used equipment, would result in an inflated discrepancy in value that overstated economic obsolescence.

Mr. Turner's appraisal of the property produced a value slightly higher than the County's assessment. The record supports the Commission's reliance on this appraisal. The Commission heard competent testimony supporting its findings that secondary market sales of used grocery store equipment were inappropriate for consideration in downward adjustment the appraisal value of taxpayer's equipment, and that Mr. Rolnick's appraisal methodology did not adequately factor delivery and installation costs into such sales in any event, thus inflating depreciation due to economic obsolescence. Competent evidence also supported the Commission's findings that functional obsolescence did not affect the property. Accordingly, we uphold the Commission's legal determination that the County met its shifted burden to prove that its assessment did not substantially exceed true value of the property.

### III. Conclusion

For the foregoing reasons, we affirm the Commission's Final Decision.

AFFIRMED.

Judge BRYANT concurs.

Judge TYSON concurs in the result in part and dissents in part.

TYSON, Judge, concurring in the result in part and dissenting in part.

### I. Introduction

The County failed to either object or move to dismiss this appeal for almost three years. The County has waived any objection to the nonjurisdictional signature requirement in their motion to dismiss. It is unnecessary to articulate a scrivener's exception to our common law, statutes, or precedents. I concur in the result only with this section of the majority's opinion.

I also concur with the majority opinion's conclusion that the record shows competent evidence supports the PTC's determination that Taxpayer had met its burden to produce evidence tending to show the County's appraisal methodology did not produce or establish market value. Taxpayer's showing shifted the evidentiary burden to the County to rebut this evidence.

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I respectfully dissent from the majority opinion's conclusion that the County rebutted the Taxpayer's showing that the County had used an arbitrary and illegal method of appraisal to value and assess Taxpayer's personal property at market value. *See In re AMP, Inc.*, 287 N.C. 547, 563, 215 S.E.2d 752, 762 (1975).

II. County's Motion to Dismiss

Before the Property Tax Commission ("PTC"), Harris Teeter ("Taxpayer") argued the County had waited over three years to file the motion to dismiss. Any issue with Taxpayer's form AV-14 filed with the PTC was not jurisdictional under N.C. Gen. Stat. § 105-290(d2) (2019) and was cured by counsel's notice of appearance, also filed with the PTC. The County waived any challenge to the form AV-14 by failing to object and by filing the motion to dismiss three years later after the alleged defect had been cured. *See Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 198, 657 S.E.2d 361, 365 (2008) ("a party's failure to comply with nonjurisdictional rule requirements normally should not lead to dismissal of the appeal").

The majority's opinion employs an improper analysis to reach their conclusion. N.C. Gen. Stat. § 84-5 governs the "practice of law by corporation[s]" and states, in relevant part: "It shall be unlawful for any corporation to practice law or appear as an attorney for any person in any court in this State . . . and no corporation shall . . . draw agreements, or other legal documents." N.C. Gen. Stat. § 84-5 (2019).

Under the Administrative Code, 17 N.C. Admin. Code 11.0216(a) provides the bright line rule for practice before the PTC. "Parties appearing before the Property Tax Commission may either represent themselves if natural persons, or shall be represented by an attorney licensed to practice law in North Carolina, except as provided for in G.S. 105-290(d2)." 17 N.C. Admin. Code 11.0216(a) (2020). "This requirement shall not be waived by the Commission." *Id.* Taxpayer did not comply with this rule. Any defect was cured by the notice of appearance and representation by licensed counsel in preparation for the hearing, in filings before the PTC, and at the hearing. The text of N.C. Gen. Stat. § 105-290(d2) provides a limited exception for individuals involved in a corporation to appear, that is not applicable to this filing. N.C. Gen. Stat. § 105-290(d2) ("If a property owner is a business entity, the business entity may represent itself using a nonattorney representative who is one or more of the following of the business entity: (i) officer, (ii) manager or member-manager, if the business entity is a limited liability company, (iii) employee whose income is reported on IRS Form W-2, if the business entity authorizes the representation in writing, or (iv) owner of

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the business entity, if the business entity authorizes the representation in writing and if the owner's interest in the business entity is at least twenty-five percent (25%). Authority for and prior notice of nonattorney representation shall be made in writing, under penalty of perjury, to the Commission on a form provided by the Commission.”).

By asserting the Taxpayer's unlicensed employee's signature on the form AV-14 was neither a practice of law nor an appearance, the majority's opinion disregards N.C. Gen. Stat. §§ 84-5, 105-290(d2), and 17 N.C. Admin. Code 11.0216(a), and fails to properly reconcile or follow this Court's recent opinion in *State v. Cash*, \_\_ N.C. App. \_\_, \_\_, \_\_ S.E.2d \_\_, \_\_, 2020 WL 1264007 at \*3 (holding “a corporation is prohibited from practicing law, and because ‘a corporation must be represented by a duly admitted and licensed attorney-at-law and cannot proceed *pro se*” (citation omitted)).

The majority attempts to distinguish *Cash* with reliance upon *Duke Power Co. v. Daniels*, 86 N.C. App. 469, 358 S.E.2d 87 (1987). *Duke Power Co.* only analyzes N.C. Gen. Stat. § 84-5, and not a PTC rule of practice or the Administrative Code. *Id.* at 471-72, 358 S.E.2d at 89. Their opinion also overextends the narrow application of *Duke Power Co.* to the relaxed pleading, procedural, and practice requirements in small claims court before the magistrate to the PTC's and other agencies' and commissions' rules of practice. 17 N.C. Admin. Code 11.0216(a).

The County's failure to assert its motion to dismiss for three years, and after a notice of appearance of counsel had been filed, waived any objection to Taxpayer's otherwise timely and proper AV-14. *Dogwood*, 362 N.C. at 198, 657 S.E.2d at 365.

### III. True Value of Money

The PTC is “the trial court of record” for appeals of decisions from county boards of equalization and review. N.C. Gen. Stat. § 105-290 (2019). Even under the “whole record test”, this Court reviews the PTC's conclusions of law *de novo*. *In re Appeal of Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 646-47, 576 S.E.2d 316, 319 (2003). The ultimate determination of “true value in money” and “market value” under the statute is a conclusion of law. *Id.* (“Questions of law receive *de novo* review, while issues such as sufficiency of the evidence to support the Commission's decision are reviewed under the whole-record test.”).

Unlike the majority's assertion, this case is not simply a determination of a method of valuation, which is not disputed, but a review of the Commission's conclusion of the “true value in money” of Taxpayer's personal property. *See Id.* “[A]ny determination requiring the exercise of

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judgment or the application of legal principles is more properly classified a conclusion of law.” *Barnette v. Lowe’s Home Ctrs., Inc.*, 247 N.C. App. 1, 6, 785 S.E.2d 161, 165 (2016) (citation omitted).

A finding of fact is a “determination reached through logical reasoning from the evidentiary facts.” *Id.* The calculation of the “true value of money,” involves the application of statutory legal principles, which is a conclusion of law and not a finding of fact. *See id.*

The standard the PTC must apply to determine and conclude the “true value in money” to assess a taxpayer’s property is statutorily established by the General Assembly:

All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words “true value” shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283 (2019).

This Court has held that a property valuation methodology utilized by the county, which fails to produce a “true value in money” as is defined in N.C. Gen. Stat. § 105-283, is both arbitrary and illegal. *In re Appeal of Lane Co.*, 153 N.C. App. 119, 124, 571 S.E.2d 224, 227 (2002).

The statutory definition requires the “‘true value in money’ shall be interpreted as meaning market value.” N.C. Gen. Stat. § 105-283. This definition is both well-known and widely used beyond the context of assessing the value of real and personal property for *ad valorem* taxation. It is the same definition of market value used by the federal government and the Appraisal Institute. Treas. Reg. § 20.2031-1(b) (as amended in 1965) (“The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.”); *see also Fair Market Value*, Dictionary of Real Estate Appraisal p. 141 (6th Ed. 2015).

The Supreme Court of the United States has held:

The market value of . . . property is the price which it might be expected to bring if offered for sale in a fair

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market; not the price which might be obtained on a sale at public auction or a sale forced by the necessities of the owner, but such a price as would be fixed by negotiation and mutual agreement, after ample time to find a purchaser, as between a vendor who is willing (but not compelled) to sell and a purchaser who desires to buy but is not compelled to take the particular . . . , piece of property.

*BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537-38, 128 L. Ed. 2d 556, 564 (1994) (citations omitted).

As such, it is the objective “market value” or “true value in money,” and not an unadjusted agency-prepared “one size fits all” schedule of values or undifferentiated mass appraisal, that controls and determines the taxable value of real or personal property subject to assessment. *See* N.C. Gen. Stat. § 105-283.

The North Carolina Department of Revenue clearly recognizes the market-based “true value in money” mandate of the statute. The transcript shows the Department of Revenue’s business personal property schedules clearly caution they “have been prepared . . . as a *general guide* to be used in the valuation of business personal property utilizing the replacement cost approach to value.” (Emphasis supplied). Since they “are only a guide,” the assessor is admonished; “[t]here may be situations where the appraiser will need to make adjustments for additional or less functional or economic obsolescence or for other factors.”

This directive, requiring the assessor using the schedule of values and applying depreciation “to make adjustments for additional or less functional or economic obsolescence or for other factors,” is also required by precedents. “Depreciation may be caused by deterioration, which is a physical impairment, such as structural defects, or by obsolescence, which is an impairment of desirability or usefulness brought about by changes in design standards (*functional obsolescence*) or factors external to the property (*economic obsolescence*).” *In re Appeal of Stroh Brewery*, 116 N.C. App. 178, 186, 447 S.E.2d 803, 807 (1994) (emphasis original) (internal quotation marks and citations omitted).

The Taxpayer, County, and PTC agree the cost approach is the appropriate appraisal methodology for valuing Taxpayer’s personal property. The parties also agree that widely accepted depreciation schedules used in the appraisal profession and tax assessors should be applied in a manner to determine the degree to which the property’s current value has decreased since the Taxpayer’s acquisition cost.

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The cost approach commonly measures value by estimating the current cost of a new asset, then deducting for various elements of depreciation, including physical deterioration and functional and external obsolescence to arrive at “depreciated cost new.” The “cost” may be either reproduction or replacement costs. The logic behind this method is that an indication of value of the asset is its cost (reproduction or replacement) less a charge against various forms of obsolescence such as functional, technological and economic as well as physical deterioration if any.

*In re Appeal of IBM Credit Corp.*, 201 N.C. App. 343, 351, 689 S.E.2d 487, 493 (2009).

The parties disagree about the degree of adjustments for functional and economic obsolescence to be applied to further adjust the scheduled values to allow for additional depreciation, after application of the depreciation schedules. The crux of the issue before the PTC and on appeal is the proper application of “an impairment of desirability or usefulness brought about by changes in design standards (*functional obsolescence*) or factors external to the property (*economic obsolescence*)” to arrive at the statutorily required mandate of determining “true value in money” prior to assessment. *Stroh Brewery*, 116 N.C. App. at 186, 447 S.E.2d at 807.

The improper determination of “true value in money,” *i.e.*, “market value” is unlawful as an “arbitrary or illegal” method of appraisal, but the taxpayer’s evidence “must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, *i.e.*, that the valuation was *unreasonably* high.” *AMP*, 287 N.C. at 563, 215 S.E.2d at 762 (emphasis original).

That second element the taxpayer is required to show is uncontested here. Assessor Kenneth Joyner, Jr. testified the County used the replacement cost approach and assessed Taxpayer’s property in the six locations at bar at \$21,434,313.00. Mitchell Rolnick, MAI, Taxpayer’s expert witness and appraiser, used the replacement cost approach and appraised the property at \$13,663,000.00, or \$7,771,313.00 lower than the County’s valuation. The majority’s opinion baldly asserts this uncontested difference of the parties’ evidence of values produced is not “*substantially* greater than the true value in money of the property assessed.” *Id.* At the six representative stores the difference in values presented was \$7,771,313.00, a difference of over 50% of Taxpayer’s asserted value. This difference by itself “substantially exceeds true



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value” and, when compounded across all of Taxpayer’s locations within the County “substantially exceeds true value.”

We all agree: (1) the record shows competent evidence supported the PTC’s determination that Taxpayer met its burden to produce evidence tending to show the County’s appraisal methodology did not produce market value; and, (2) that showing shifted the evidentiary burden to the County to show otherwise. *See In re Appeal of Parkdale Mills*, 225 N.C. App. 713, 717, 741 S.E.2d 416, 420 (2013) (“once the taxpayer rebuts the initial presumption, the burden shifts back to the County which must then demonstrate that its methods produce true values”); *see also* N.C. Gen. Stat. § 105-283.

The Commission properly concluded Taxpayer met its burden to produce evidence showing the County’s appraisal methodology did not produce “true value in money,” which shifted the evidentiary burden of persuasion to the County to show otherwise. N.C. Gen. Stat. § 105-283. *See In re Blue Ridge Mall*, 214 N.C. App. at 267, 713 S.E.2d at 782 (“In attempting to rebut the presumption of correctness, the burden upon the aggrieved taxpayer is one of production and not persuasion.” (quotation marks and citation omitted)). Nothing else appearing, Taxpayer’s appeal would be upheld, and a decision entered in its favor.

The County called Appraiser James Turner in an attempt to rebut Taxpayer’s evidence that additional depreciation adjustments were needed and appropriate to apply to the cost approach to Taxpayer’s personal property. Mr. Turner candidly acknowledged he agreed with Taxpayer and had also adjusted initial values from the schedule of values downward for certain classes of Taxpayer’s personal property, which are quickly rendered obsolete by rapid technological advancements, such as electronic scanning equipment and computers.

Mr. Turner also agreed with Taxpayer and accelerated depreciation for downward adjustments in value on certain classes of equipment that taxpayer had replaced on a more frequent basis than the timelines listed in the depreciation tables. These further downward adjustments from the values in the schedules were required, as Taxpayer argues, to arrive at a lawful “true value in money,” notwithstanding that “the equipment [w]as fully functioning and installed into an integrated and operational grocery store,” or the personal property is sold in individual units on the open market, rather than sold as fully installed and operative equipment to a competitor as a going concern.

The County cannot have it both ways. Unless otherwise agreed, all personal property, and even more specifically used personal property,



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is normally sold as individual units, “as-is”, “where is” with costs for removal, shipping, and re-installation solely at the buyer’s expense.

For example, the United States General Services Administration (“GSA”) sells all manner and types of used personal property on its national sales website. General Services Administration, Terms and Conditions, <https://gsaauctions.gov/gsaauctions/gsaauctions/>. This personal property sale includes, *e.g.*, used ships, helicopters, airplanes, motor vehicles, construction and building equipment, computer and electronic equipment, shelving, restaurant and retail fixtures, and equipment.

The GSA terms of purchase, *inter alia*, to the buyer are:

2. CONDITION AND LOCATION OF PROPERTY

. . . all property listed therein is offered for sale “as is” and “where is”. . . the Government makes no warranty, express or implied, as to quantity, kind, character, quality, weight, size, or description of any of the property, or its fitness for any use or purpose.

. . .

8. DELIVERY, LOADING, AND REMOVAL OF PROPERTY. a. . . the Purchaser shall be entitled to obtain the property upon full payment therefor with delivery being made only from the exact place where the property is located. . . . The Purchaser must make all arrangements necessary for packing, removal, and transportation of property.”

Gen. Serv. Admin., Standard Form 114C, Sale of Government Property General Sale Terms and Conditions (rev. 4/2001), <https://www.gsa.gov/forms-library/sale-government-property-general-sale-terms-and-conditions>.

By definition, personal property is stand-alone, movable at the whim of the owner, and, like currency, “knows no home.” If personal property is otherwise so aggregated or permanently attached to real property, and “cannot be removed without material injury to the freehold,” it becomes a fixture and is valued and assessed as real property. *Ilderton Oil Co. v. Riggs*, 13 N.C. App. 547, 549, 186 S.E.2d 691, 693 (1972) (citation omitted); *Fixture*, Black’s Law Dictionary (11th ed. 2019) (“Personal property that is attached to land or a building and that is regarded as an irremovable part of the real property”).

Mr. Rolnick, Taxpayer’s appraiser, testified used grocery store equipment, equivalent in age and specifications to Taxpayer’s property

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sold for prices drastically below the County's un-adjusted appraised values from the depreciation schedules of values. He testified the market sales tended to show that these low market prices for used grocery store equipment necessitated downward adjustment of any values estimated by depreciation schedules to reflect additional economic and functional obsolescence, that was not captured by the schedules used by the County. He further testified that these further market adjustments resulted in appraisal values consistent with "true value in money."

This evidence was not disputed nor rebutted by the County. Mr. Turner blamed the low values of the used personal property on: (1) consolidation of the grocery retail market; (2) closing of stores that put greater volumes of used equipment on the market; (3) the policy of Taxpayer and other chain grocery stores to not buy used equipment for its stores; and, (4) personal property being sold as individual units and not remaining in place in the closed store, which buildings may be owned by others, and grocers' leases requiring removal of their personal property when the store is closed.

None of these factors, individually or in the aggregate, rebut Taxpayer's unchallenged evidence of the personal property's "true value in money." Mr. Turner's analysis of personal property and the PTC's conclusion thereon is arbitrary, unlawful, and is wholly inconsistent with long-established definitions, precedents, and attributes governing personal property.

As stated in the statute, these transactions and factors are only indications of supply and demand in a limited market, in which prices fluctuate and are determined by the

market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

N.C. Gen. Stat. § 105-283. When the market is limited and supply is abundant, demand, and consequently "true value in money," is lower. *See id.*

#### IV. Delivery and Installation Costs

Mr. Turner testified adding delivery and installation costs to the sales price for new equipment to reach the original cost to taxpayer, while failing to do so for sales prices of used equipment, would result in

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an inflated discrepancy in value that overstated economic obsolescence. Mr. Rolnick testified the additional costs of delivery and installation as well as warranties and guarantees from the seller should be added to the upfront costs, but not to the secondary used market because those transactions are “as is/where is” sales. These costs should not be added to the price of used equipment. The PTC’s conclusion only applied to the installation and delivery costs and failed to recognize and reconcile the bargained-for values in new equipment’s warranties, service, and right to return defective products as outlined by Mr. Rolnick.

This fallacy also creates an unequal application and improperly calculates “true value in money.” Sellers of used and second-hand equipment offer “as is/where is” transactions, unless otherwise agreed. As was noted in the GSA conditions of sale, Buyers are responsible for moving, installing, and servicing the used equipment. The seller of used equipment does not generally issue a warranty or guarantee to the buyer. Unlike in the new equipment market, if the buyer of used equipment has a problem, they do not contact the seller for service. Sellers of used personal property do not normally provide these benefits to the buyer, and its price should not be attributed to the seller.

### V. Conclusion

We all agree Taxpayer’s evidence showed the County had employed an “arbitrary or illegal” method of appraisal to arrive at an improper determination of “true value in money” or “market value.” The uncontested evidence also shows “the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably* high,” to reverse the PTC’s conclusions of law. *AMP*, 287 N.C. at 563, 215 S.E.2d at 762.

Mr. Turner agreed with Taxpayer that further adjustments were required from the schedule of values on certain personal property, as is acknowledged by the Department of Revenue’s guidelines. His analysis and opinions showed nothing to rebut this evidence or to present evidence to meet the statutory definition and mandate for the County to assess the personal property’s “true value in money” or “market value.” *Id.*

The County failed to rebut and overcome the Taxpayer’s evidence of value to support the PTC’s conclusions of law. I vote to reverse the order appealed from and respectfully dissent.

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NANCY KELLER, BY AND THROUGH HER ATTORNEY-IN-FACT, LESLIE ANN KELLER, PLAINTIFF

v.

DEERFIELD EPISCOPAL RETIREMENT COMMUNITY, INC. AND JEFFREY TODD  
EARWOOD, DEFENDANTS<sup>1</sup>

No. COA19-633

Filed 2 June 2020

**1. Torts, Other—sexual battery—alleged against nursing assistant—claim of ratification by employer—sufficiency of evidence**

In a case in which a certified nursing assistant was alleged to have committed sexual battery on a patient with advanced dementia at a skilled nursing facility, where the evidence did not support plaintiff's contention that the facility ratified the employee's actions by conducting an inadequate investigation and preventing other agencies from investigating the incident, the trial court properly granted summary judgment to defendant facility on plaintiff's claim of ratification. The facility suspended the nursing assistant and conducted an internal investigation, timely reported the incident to state authorities, and fully complied with all third-party investigations.

**2. Torts, Other—negligent supervision and retention—sexual battery—nursing home assistant—employer's actions**

In a case in which a certified nursing assistant was alleged to have committed sexual battery on a patient with advanced dementia at a skilled nursing facility, the trial court properly granted summary judgment to defendant facility on plaintiff's claim of negligent supervision and retention where the evidence showed the facility thoroughly vetted the employee prior to hiring him, suspended the employee pending an internal investigation following the battery allegation, and allowed the employee to resume work only after a conclusion was reached that the allegation could not be substantiated.

**3. Evidence—expert testimony—basis for opinion—medical records**

In a case in which a certified nursing assistant was alleged to have committed sexual battery on a patient with advanced dementia at a skilled nursing facility, the trial court did not err by allowing

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1. Defendant Earwood's first name is spelled inconsistently throughout the record. Accordingly, we adopt the spelling found in the order and judgment from which Plaintiff appeals.

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testimony of a medical expert that the patient's medication may have caused her to hallucinate the incident, where that opinion was formed from facts gleaned from medical records and depositions available in the record.

**4. Evidence—prior assault—Rule 404(b)—exclusion**

In a case in which a certified nursing assistant was alleged to have committed sexual battery on a patient with advanced dementia at a skilled nursing facility, the trial court did not abuse its discretion by excluding evidence of a prior assault allegedly committed by the nursing assistant against another resident of the facility. Even if the prior incident was substantially similar to the alleged battery, the evidence was properly excluded pursuant to Evidence Rule 404(b) where it was offered to demonstrate the dangerous nature of the nursing assistant.

Appeal by plaintiff from order entered 17 August 2018 by Judge Marvin P. Pope, Jr., in Buncombe County Superior Court, and from judgment entered 6 November 2018 by Judge Thomas H. Lock in Buncombe County Superior Court. Heard in the Court of Appeals 5 February 2020.

*Law Office of David Pishko, P.A., by David Pishko, for plaintiff-appellant.*

*Parker Poe Adams & Bernstein LLP, by John H. Beyer and Katherine H. Graham, for defendant-appellee Deerfield Episcopal Retirement Community, Inc.*

*Dickie, McCamey & Chilcote, PC, by Joseph L. Nelson, for defendant-appellee Jeffrey Todd Earwood.*

ZACHARY, Judge.

Plaintiff Nancy Keller, by and through her attorney-in-fact, Leslie Ann Keller, appeals from (1) an order granting summary judgment and dismissing Keller's claims against Defendant Deerfield Episcopal Retirement Community, Inc.; and (2) a judgment entered upon a jury's verdict finding in favor of Defendant Jeffrey Todd Earwood on Keller's claim of battery. After careful review, we affirm.

**Background**

In April 2013, Plaintiff Nancy Keller ("Keller") joined Defendant Deerfield Episcopal Retirement Community, Inc. ("Deerfield"), as an

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independent living resident. In December 2014, Keller moved to Deerfield's assisted living section because "she was consistently forgetting to do things" and required supervision. Soon thereafter, on 11 March 2015, Keller moved to Deerfield's skilled nursing section, due to her advanced dementia.

Defendant Jeffrey Todd Earwood ("Earwood"), was employed as a certified nursing assistant at Deerfield. On 30 March 2015, Earwood was assisting Deerfield residents returning to their rooms after lunch when he noticed Keller walking down the hallway, "heading in the wrong direction" and "looking confused." Earwood offered to help her back to her room, which was a usual task after lunch. While Earwood was helping Keller, another Deerfield staff member asked for Earwood's help with a dressing change for a patient in the neighboring room.

Earwood led Keller into her room, closing the bottom half of the Dutch door behind them, but leaving the top half open. When Keller asked Earwood where she should sit, he reminded her that this was her room, and she could sit anywhere she wanted. Keller sat on her bed, and Earwood asked her if he could get her anything. Keller replied that she did not "know if [she] c[ould] trust [him,]" so Earwood sat down beside her on the edge of the bed, getting "eye level"—as he was trained to do—and jokingly asked Keller, "[I]s this not a face you can trust?" Keller responded, "[T]he rest is up to you." Earwood then stood up and told Keller that he would "prove [him]self" in order to earn her trust. He patted Keller on the shoulder, and Earwood left to help with another patient's dressing change. Earwood was in Keller's room "for approximately one minute."

Soon thereafter, Keller's personal aide, Iris Hinze, arrived. Keller told her aide that "someone had exposed himself to her and had put her hand on his private parts." Hinze then stepped in the hallway, and asked Earwood if "it was him who had walked [Keller] back to her room[.]" Earwood confirmed and inquired whether "everything was okay," and then left to finish his shift.

Upon Keller's request, Hinze called Keller's daughter, Leslie Ann Keller, and Keller informed her of the alleged incident. Leslie arrived at Deerfield soon thereafter, and she took Keller and Hinze to meet with the facility's social worker. Keller shared with the social worker that "a man had come into her room and exposed himself to her." She also told the social worker that the man had "placed her hand on his private parts and . . . fondled himself" in front of her.

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The acting director of nursing was immediately notified of the incident, and Earwood was questioned about the alleged sexual battery during a phone call with Deerfield's director of quality assurance and the unit coordinator. Earwood was suspended, pending Deerfield's internal investigation of the sexual battery allegation.

On 31 March 2015, Deerfield submitted the required 24-Hour Initial Report to the North Carolina Department of Health and Human Services, Health Care Personnel Registry. Deerfield timely submitted the requisite "5-Working Day Report" on 6 April 2015. Deerfield concluded its internal investigation that day, determining that it was "unable to substantiate allegations" due to the absence of direct witnesses, Keller's clinical diagnosis of dementia, and a physician's determination that she lacked capacity. After 31 March 2015, Keller never raised the allegation again.

On 7 April 2015, Earwood was reinstated and permitted to return to work. Upon his return, Earwood was assigned to work on a different hall where he did not have direct contact with Keller, and where he received more supervision.

By mid-June 2015, the Healthcare Personnel Registry; Buncombe County Department of Social Services, Adult Protective Services Unit ("DSS"); and the North Carolina Division of Health Service Regulation had received reports about the alleged assault. The three agencies independently concluded that the allegation was unsubstantiated. However, Leslie did not agree with these conclusions, and thus, as attorney-in-fact for her mother, on 30 January 2017, Leslie filed a complaint asserting claims against Earwood and Deerfield. Specifically, the complaint asserted claims for assault and battery against Earwood. The complaint also asserted claims against Deerfield for ratification of Earwood's assault and battery under the theory of respondeat superior, and for negligent supervision and retention of Earwood. She also sought to recover punitive damages from Deerfield.

On 9 March 2017, Earwood filed a motion to dismiss, answer, and affirmative defenses. On 6 June 2018, Deerfield moved for summary judgment and attorney's fees. Earwood also moved for summary judgment on 23 July 2018.

Defendants' motions for summary judgment came on for hearing before the Honorable Marvin P. Pope, Jr., in Buncombe County Superior Court on 13 August 2018. On 17 August 2018, Judge Pope entered orders denying Earwood's motion for summary judgment, granting Deerfield's motion for summary judgment, dismissing Keller's claims against Deerfield with prejudice, and denying Deerfield's motion for attorney's fees.

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On 24 September 2018, Keller's claims against Earwood came on for trial by jury in Buncombe County Superior Court, the Honorable Thomas H. Lock presiding. On 28 September 2018, Judge Lock granted Earwood's motion for directed verdict on the claim of assault. On 1 October 2018, the jury unanimously found that Earwood did not commit a battery upon Keller, and on 6 November 2018, Judge Lock entered judgment in accordance with the jury's verdict.

Keller filed timely notice of appeal to this Court from the order granting summary judgment in favor of Deerfield, and the trial court's final judgment reflecting the jury's verdict in favor of Earwood.

**Discussion**

Keller sets forth four arguments on appeal: (i) the trial court erred in granting summary judgment in favor of Deerfield on the claim that Deerfield ratified Earwood's sexual battery; (ii) the trial court erred in granting summary judgment in favor of Deerfield on the claim for negligent retention and supervision of Earwood; (iii) the trial court erred by overruling her objection to the admission of opinion testimony by James Parsons, M.D.; and (iv) the trial court erred by excluding evidence of an alleged prior assault by Earwood against a Deerfield resident.

**I. Summary Judgment**

Keller first challenges the trial court's grant of summary judgment in favor of Deerfield as to her claims for (i) ratification of Earwood's sexual battery; and (ii) negligent retention and supervision of Earwood.

**A. *Standard of Review***

Summary judgment is proper only if: "(1) the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact; and (2) the moving party is entitled to judgment as a matter of law." *Honeycutt v. Honeycutt*, 208 N.C. App. 70, 77, 701 S.E.2d 689, 694 (2010) (citation omitted).

In ruling on a motion for summary judgment, the trial court must view the evidence "in the light most favorable to the non-moving party." *RME Mgmt., LLC v. Chapel H.O.M. Assocs., LLC*, 251 N.C. App. 562, 566, 795 S.E.2d 641, 644 (citation omitted), *disc. review denied*, 370 N.C. 213, 804 S.E.2d 546 (2017). Furthermore, it is well established that

[t]he party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact. This burden may be met by proving that an essential



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element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of h[er] claim or cannot surmount an affirmative defense which would bar the claim.

*Badin Shores Resort Owners Ass'n v. Handy Sanitary Dist.*, 257 N.C. App. 542, 549, 811 S.E.2d 198, 204 (2018) (citation omitted).

"Once the party seeking summary judgment makes the required showing, the burden shifts to the non-moving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that [s]he can at least establish a *prima facie* case at trial." *Id.* at 550, 811 S.E.2d at 204 (citation omitted). "[T]he non-moving party must forecast sufficient evidence to show the existence of a genuine issue of material fact in order to preclude an award of summary judgment." *Id.* (citation omitted).

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (citation and internal quotation marks omitted). Indeed, "if a grant of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *RME Mgmt., LLC*, 251 N.C. App. at 567, 795 S.E.2d at 645 (citation and internal quotation marks omitted).

*B. Analysis*

1. Ratification

[1] Keller first argues that the trial court "erroneously concluded that no reasonable jury could find that [her] forecast of evidence was sufficient to establish that Deerfield ratified Earwood's conduct toward her, making Deerfield liable for the emotional distress she suffered as a result[.]" Specifically, Keller contends that Deerfield ratified Earwood's sexual battery "by conducting an inadequate, skewed investigation and preventing other more objective agencies from investigating the alleged crime." We disagree.

To establish that an employer ratified the wrongful act of an employee, the plaintiff must show either (1) that "the employer had knowledge of all material facts and circumstances relative to the wrongful act, and that the employer, by words or conduct, show[ed] an intention to ratify the act[.]" *Brown v. Burlington Industr., Inc.*, 93 N.C.

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App. 431, 437, 378 S.E.2d 232, 236 (1989) (citation omitted), *disc. review improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990), or (2) “had knowledge of facts which would lead a person of ordinary prudence to investigate further[.]” *Guthrie v. Conroy*, 152 N.C. App. 15, 27, 567 S.E.2d 403, 412 (2002) (citation and internal quotation marks omitted). Ratification may be evidenced by “any course of conduct on the part of the principal which reasonably tends to show an intention on his part to ratify the agent’s unauthorized acts.” *Brown*, 93 N.C. App. at 437, 378 S.E.2d at 236 (citation omitted). Such course of conduct may involve a failure to act. *See id.*

Here, Keller contends that a reasonable jury could find that her forecast of evidence was sufficient to establish that Deerfield ratified Earwood’s alleged sexual battery, thus rendering Deerfield liable for Keller’s resulting emotional distress. Keller contends that the following demonstrates Deerfield’s intention to ratify Earwood’s conduct:

- a) Deerfield did not notify any law enforcement agency of [Keller’s] allegation against Earwood. The sexual assault certainly would constitute a crime, but Deerfield officials chose to conduct an investigation in house, rather than call in objective investigators with special skills in interviewing criminal suspects and victims.
- b) Despite their knowledge of [Keller’s] memory issues, Deerfield’s officers did not seek the assistance of anyone trained in interviewing persons with dementia and chose not to videotape [Keller’s] account of what occurred so that a person with training could assess her credibility.
- c) Deerfield employees did not interview Earwood in person and thus had no opportunity to assess his credibility. Parris, Deerfield’s Director of Quality Assurance, was placed in charge of the investigation. He elected to interview Earwood over the telephone and then asked Earwood to submit a written statement. Further, no one confronted Earwood about the significant inconsistency in his two accounts of what occurred in [Keller’s] room – whether he sat beside her on the bed or in front of her in a chair, or about the discrepancy between his description of his conduct after the alleged assault and the description provided by Nurse Ouellette.
- d) Deerfield omitted the significant fact in its reports to the Health Care Personnel Registry that [Keller] alleged

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that Earwood not only exposed his “private parts” but forced her to fondle his penis. Deerfield also stated in its first report, before any type of investigation, that there was no reasonable suspicion of a crime. Within less than 24 hours, Deerfield officials decided to totally discount [Keller’s] account.

e) Deerfield submitted inaccurate and misleading reports to the Health Care Personnel Registry – describing a less severe “exposure” incident – arguably to encourage the state agency to forego any investigation.

f) No Deerfield employee interviewed or assessed [Keller] after 31 March 2015 – one day after the alleged assault. Yet, Deerfield reported to the State that [Keller] did not have mental anguish lasting five days or more and also maintained that [Keller] “totally forgot” the assault after one day.

g) Deerfield officials rejected the recommendation of its Director of Nursing and Director of Quality Assurance that Earwood’s employment be terminated. These recommendations were based in part on the fact that Earwood had “a couple of other disciplinary issues” and the fact that [Keller] had never made any sort of similar allegation during her time at Deerfield. . . .

h) Deerfield’s President and CEO expressed a concern that, if [Keller’s] allegation was believed, a similar complaint could be lodged against him.

i) After [Keller’s] report of abuse, Deerfield did not monitor Earwood’s interaction with other residents. Rather, Deerfield’s nursing staff was instructed to institute behavioral monitoring of [Keller], specifically documenting her interaction with male residents. Nothing uncovered in Deerfield’s sham investigation suggested that [Keller] initiated or encouraged Earwood’s sexual advance. The decision to monitor her could be reasonably interpreted as a form of punishment for her report against Earwood.

Keller’s allegations lack merit. The acting director of nursing “was immediately notified of the incident[,]” and Earwood was questioned about the alleged sexual battery the same day that the allegation was made. Additionally, Earwood was suspended at once pending Deerfield’s internal investigation of the sexual battery allegation, and he

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was permitted to return to work only after Deerfield determined that Keller's allegation could not be substantiated. Upon his return, Earwood was assigned to work on a different hall where he did not have direct contact with Keller, and where he received a higher level of supervision.

Furthermore, Deerfield fully cooperated with all third-party investigations. Under N.C. Gen. Stat. § 131E-256(a), the North Carolina Department of Health and Human Services must

establish and maintain a health care personnel registry containing the names of all health care personnel working in health care facilities in North Carolina who have:

(1) Been subject to findings by the Department [of Health and Human Services] of:

a. Neglect or abuse of a resident in a health care facility or a person to whom home care services as defined by [N.C. Gen. Stat. §] 131E-136 or hospice services as defined by [N.C. Gen. Stat. §] 131E-201 are being provided.

....

(2) Been accused of any of the acts listed in subdivision (1) of this subsection, but only after the Department [of Health and Human Services] has screened the allegation and determined that an investigation is required.

The Health Care Personnel Registry shall also contain findings by the Department [of Health and Human Services] of neglect of a resident in a nursing facility or abuse of a resident in a nursing facility or misappropriation of the property of a resident in a nursing facility by a nurse aide that are contained in the nurse aide registry under [N.C. Gen. Stat. §] 131E-255.

N.C. Gen. Stat. § 131E-256(a) (2019); *see also id.* § 131E-1(1).

To facilitate this process, health care facilities must submit certain reports when residents allege abuse against health care personnel at the facilities, which the Department then screens to determine whether an investigation is required. On 31 March 2015, Deerfield submitted to the Health Care Personnel Registry the required 24-Hour Initial Report, followed by the requisite 5-Working Day Report on 6 April 2015. *See id.* § 131E-256(g) ("The results of all investigations must be reported to the

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Department [of Health and Human Services] within five working days of the initial notification to the Department.”); *see also id.* § 131E-1(1).

On 8 April 2015, the Health Care Personnel Registry wrote to Deerfield, noting that it had “carefully review[ed] the reported allegation,” and “determined that an investigation w[ould] not be conducted in this case.” Then, between 15 and 18 June 2015, personnel from the North Carolina Division of Health Services Regulation conducted an on-site investigation at Deerfield, and determined that “[b]ased on observations, record review, staff, resident, and family interviews this allegation could not be substantiated at the time of the investigation.” Thereafter, during June and July 2015, DSS Adult Protective Services agents conducted an on-site investigation. Noting that there was “no evidence” that Keller was abused, DSS determined that the allegation was unsubstantiated, and concluded that Keller did not need protective services.

Moreover, contrary to Keller’s assertions on appeal, Keller did not forecast “evidence demonstrating specific facts” in support of her allegations that she suffered emotional distress as a result of the alleged battery, or that Deerfield forced her to relocate to another facility. *Badin Shores Resort Owners Ass’n*, 257 N.C. App. at 550, 811 S.E.2d at 204. In fact, at her 14 July 2017 deposition, Leslie testified that, since March 2015, no mental health professional had diagnosed Keller with “any mental or emotional condition related to” the alleged events; Keller had not been “prescribed any kind of antidepressant or antianxiety medication for anything” related to the alleged events; no healthcare professional had diagnosed Keller as suffering from any kind of mental anguish; and Keller had not been seen by any “therapist, counselor, [or] mental health professional, for . . . anything relating to” the alleged event.

“As discussed above, [Keller], as the non-movant, must come forward with facts to counter a proper motion for summary judgment. The official record contains no factual evidence showing” that Deerfield ratified Earwood’s conduct. *Graham v. Hardee’s Food Sys.*, 121 N.C. App. 382, 387, 465 S.E.2d 558, 561 (1996).

Accordingly, the trial court properly granted summary judgment in favor of Deerfield as to Keller’s claim of ratification.

## 2. Negligent Supervision and Retention

**[2]** “North Carolina recognizes a cause of action for negligent supervision and retention as an independent tort based on the employer’s liability to third parties.” *Smith v. Privette*, 128 N.C. App. 490, 494, 495 S.E.2d 395, 398 (1998) (citation omitted). “This basis for imposing liability

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upon the [employer] for an assault by his employee is . . . the negligence of the [employer], himself, in the selection or supervision of his employee.” *Wegner v. Delly-Land Delicatessen, Inc.*, 270 N.C. 62, 65, 153 S.E.2d 804, 807 (1967).

“A presumption exists that an employer has used due care in hiring his employees.” *Stanley v. Brooks*, 112 N.C. App. 609, 612, 436 S.E.2d 272, 274 (1993) (citation omitted), *disc. review denied*, 335 N.C. 772, 442 S.E.2d 521 (1994). To overcome this presumption, “[t]he burden rests with the plaintiff to show that [s]he has been injured as a result of the employer’s negligent hiring if the employer had actual or constructive knowledge of the employee’s incompetency.” *Id.* (citation omitted).

To succeed on a claim for negligent supervision or retention, the plaintiff must prove:

(1) the specific negligent act on which the action is founded[;] (2) *incompetency, by inherent unfitness or previous specific acts of negligence, from which incompetency may be inferred; . . .* (3) *either actual notice to the master of such unfitness or bad habits, or constructive notice, by showing that the master could have known the facts had he used ordinary care in oversight and supervision[;]* and (4) that the injury complained of resulted from the incompetency proved.

*Medlin v. Bass*, 327 N.C. 587, 591, 398 S.E.2d 460, 462 (1990) (first emphasis added) (citations and internal quotation marks omitted).

Accordingly,

employers of certain establishments can be held liable to an invitee therein assaulted by an employee of the place of business whom the employer knew, or in the exercise of reasonable care in the selection and supervision of his employees should have known, to be likely, by reason of past conduct, bad temper or otherwise, to commit an assault, even though the particular assault was not committed within the scope of the employment.

*Stanley*, 112 N.C. App. at 611, 436 S.E.2d at 273 (citation and internal quotation marks omitted).

On appeal, Keller argues that she presented evidence from which a reasonable jury could have concluded that Deerfield should have known

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that Earwood was dangerous to residents and unfit for his job. In particular, Keller submits that she forecast sufficient evidence to establish that Deerfield was aware that Earwood posed a threat to its residents, yet continued to allow Earwood to interact with vulnerable individuals.

Keller, “as the non-movant, must come forward with facts to counter a proper motion for summary judgment. The official record contains no factual evidence showing” that Deerfield had knowledge of Earwood’s alleged proclivity for sexual misconduct. *Graham*, 121 N.C. App. at 387, 465 S.E.2d at 561. In fact, the record is replete with evidence demonstrating that Deerfield did *not* have such notice.

Prior to hiring Earwood, Deerfield “completed a background check, and fingerprints had gone to the SBI and FBI. All checks had come back with no violations of any kind. The Health Registry check had come back with no violations.” Additionally, Earwood was suspended pending Deerfield’s investigation and was permitted to return to work only after Deerfield determined that Keller’s allegation could not be substantiated. Thus, it cannot be said that prior to the alleged act, Deerfield knew or had reason to know of Earwood’s alleged potential for battery. *See id.* at 385, 465 S.E.2d at 560.

Finally, we note that following a jury trial, Earwood was unanimously found not to have sexually battered Keller, and Judge Lock entered a judgment reflecting the verdict on 6 November 2018. “[W]here the agent has no liability, there is nothing from which to derive the principal’s liability[.]” *Cameron Hospitality, Inc. v. Cline Design Assocs.*, 223 N.C. App. 223, 226, 735 S.E.2d 348, 351 (2012) (citation omitted), *disc. review denied*, 366 N.C. 564, 738 S.E.2d 370 (2013). Keller’s claims against Deerfield are dependent upon the alleged tortious conduct of Earwood. “The only tortious conduct by an employee of [Deerfield’s] that [Keller] has alleged is the acts of [Earwood,] which were the basis of her claims against him.” *Graham*, 121 N.C. App. at 385, 465 S.E.2d at 560. “[I]t has been judicially determined that” Earwood “is not liable for any tortious conduct[.]” and Keller “has not shown that an employee of [Deerfield] committed a tortious act”; thus, “this cause of action fails.” *Id.*

Accordingly, the trial court did not err by granting summary judgment in favor of Deerfield on Keller’s claim for negligent supervision and retention.

**II. Dr. Parsons’s Testimony**

[3] Keller next argues that the trial court committed reversible error by overruling her objections to opinion testimony by Dr. James Parsons.



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Specifically, Keller argues that Dr. Parsons's testimony "was entirely speculative and highly prejudicial" because his testimony that Keller's "medication may have caused her to 'hallucinate' " was an improper opinion, in that it was formed "without ever even meeting [Keller] in person." We disagree.

*A. Standard of Review*

As a general matter, "evidentiary errors are considered harmless unless a different result would have been reached at trial." *Union Cty. Bd. of Educ. v. Union Cty. Bd. of Comm'rs*, 240 N.C. App. 274, 283, 771 S.E.2d 590, 596 (2015) (citation omitted). "[O]n appeal . . . the burden is on the appellant to not only show error, but also to show that [s]he was prejudiced and a different result would have likely ensued had the error not occurred." *Outlaw v. Johnson*, 190 N.C. App. 233, 247, 660 S.E.2d 550, 561 (2008) (citation and internal quotation marks omitted).

"We . . . review a trial court's ruling on the admission or exclusion of expert testimony for abuse of discretion." *N.C. Dep't of Transp. v. Mission Battleground Park, DST*, 370 N.C. 477, 480, 810 S.E.2d 217, 220 (2018) (citation omitted). "A trial court abuses its discretion if its decision is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Pope v. Bridge Broom, Inc.*, 240 N.C. App. 365, 369, 770 S.E.2d 702, 707 (citations and internal quotation marks omitted), *disc. review denied*, 368 N.C. 284, 775 S.E.2d 861 (2015).

*B. Analysis*

Expert-witness testimony is governed by Rule 702 of the North Carolina Rules of Evidence. *See* N.C. Gen. Stat. § 8C-1, Rule 702. Subsection (a) of Rule 702 provides:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:

- (1) The testimony is based upon sufficient facts or data.
- (2) The testimony is the product of reliable principles and methods.



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(3) The witness has applied the principles and methods reliably to the facts of the case.

*Id.* § 8C-1, Rule 702(a).

Expert “[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.” *Id.* § 8C-1, Rule 704. Moreover,

[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

*Id.* § 8C-1, Rule 703.

The “facts or data upon which an expert bases an opinion may be derived from three possible sources[,]” including “the personal observation of the witness[,]” “presentation at trial by a hypothetical question or by having the expert attend the trial and hear the testimony establishing the facts[,]” and “presentation of data to the expert outside of court.” *Id.* cmt. Indeed, “an expert may testify as to the facts upon which his opinion is based, even though the facts would not be admissible as substantive evidence.” *Id.* cmt.

On appeal, Keller argues that Earwood’s expert witness, Dr. Parsons, “based his testimony entirely on the medical records of [Keller’s] primary care physician and the depositions taken in this case[,]” rendering it “entirely speculative and highly prejudicial.” This argument ignores the plain language of Rule 703, as well as our robust body of case law construing it.

Rule 703 explicitly permits an expert witness to base his opinion on records and deposition testimony. *See* N.C. Gen. Stat. § 8C-1, Rule 703 (providing that the “facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by *or made known to him* at or before the hearing” (emphasis added)). Moreover, “[i]t is well settled that an expert witness need not testify from first-hand personal knowledge, so long as the basis for the expert’s opinion is available in the record or on demand.” *Martishius v. Carolco Studios, Inc.*, 142 N.C. App. 216, 222, 542 S.E.2d 303, 307 (2001) (citation omitted), *aff’d*, 355 N.C. 465, 562 S.E.2d 887 (2002).

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Here, there is no question that Keller had full access to the materials from which Dr. Parsons formed his opinion, all of which are available in the record.

Moreover, Keller incorrectly states that Dr. Parsons “never expressed his opinions to a reasonable degree of medical certainty or probability.” During voir dire, Dr. Parsons testified that he based his opinion on Keller’s medical records and Leslie’s perceptions of Keller:

[DR. PARSONS:] I think there’s enough documentation in [Keller’s physician’s] records that this lady – well, not only in his records per his perception, but also the daughter’s perception that [Keller’s] dementia was getting worse, that there was certainly evidence of her having some delusions, if not hallucinations, and that more . . . likely than not this was a manifestation of her dementia and unlikely that it would be an actual event.

[DEFENSE COUNSEL:] *And that’s an opinion you hold to a reasonable degree of medical certainty?*

[DR. PARSONS:] I think the medical records justify that, *yes*.

(Emphases added).

Dr. Parsons then explained that he formed his opinion from facts gleaned upon review of Keller’s medical records. Dr. Parsons stated, in relevant part:

[DR. PARSONS:] I think one of the earliest things that impressed me was this note from [Keller’s physician] in January of 2012 in which it says that [another physician] [in] December of 2011 prescribed Aricept. And it says [Keller] only took Aricept for about six days, but then she stopped it due to side effect concerns. It has been some possible delusional paranoid behavior as she accused her daughter-in-law of stealing some jewelry that cannot be located.

So I mean, that impressed me that there was a medication that induced a sudden worsening which comes into play prior to this incident [o]n March 30th because she was started on sort of a similar medication, Namenda, just a few weeks before that. But through this record it talks about, you know, the signs and symptoms of worsening dementia.

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. . . .

[DEFENSE COUNSEL:] . . . [Y]ou mentioned a moment ago that [Keller] had been put on some medications a few weeks before the allegations in this case.

[DR. PARSONS:] Yes.

. . . .

Q. And the last time she was placed on a medication like Namenda, the Aricept, [Keller] exhibited some delusional paranoid behaviors?

A. Yes.

After the trial court noted that “Rule 704 . . . allows an expert to testify in the form of an opinion, even though the opinion may embrace the ultimate issue to be decided by the trier of fact[,]” Keller’s counsel explained the basis of Keller’s objection to Dr. Parsons’s testimony:

Really, the basis was the way the question was worded, that he asked do you have opinions about her allegation? And then he added and whether or not – or its relationship to her dementia. I’m objecting to the – I don’t think he can testify I don’t believe her. You know, I think he did testify as he’s described here, that I’m a medical doctor, I’ve seen this, I’ve read her records, this is my medical opinion. I don’t believe he can testify about whether or not he believes her. He can testify he thinks this is probably a delusion.

In denying Keller’s motion to strike Dr. Parsons’s testimony, the trial court stated that “during the voir dire . . . held outside the jury’s presence, *he did express his opinions to a reasonable degree of medical certainty.*” (Emphasis added).

In addition, a second expert witness, Dr. Andrew Farah, later testified “[t]o a reasonable degree of medical certainty” that he “couldn’t disagree” with Dr. Parsons’s opinion that Keller’s “medication changes could be related to an increase in delusions” and that he thought that Dr. Parsons was “spot on” regarding the likelihood that Keller’s medication may have caused her to hallucinate:

[DR. FARAH:] I couldn’t argue with [Dr. Parsons’s] premise that [Aricept and Namenda] can cause delusional thinking. They can. I mean, that’s a known side effect. I

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think in my experience sometimes I don't know if it's the drug or just the disease progression or some combination of both that's causing the delusion.

[DEFENSE COUNSEL:] All right. We saw when [Keller] tried the trial of Aricept back in 2012 there were some delusional paranoid behavior[s]. Do you recall seeing that?

A. Correct.

Q. Would the potential side effects of Namenda when it was tried in the spring of 2015 be similar to the side effects of Aricept?

A. Yes. I mean, a textbook answer, yes. I think there's a tremendous variability from patient to patient and some may tolerate one and not the other, but in general they are similar. You would expect it to cross over in those side effects.

Keller's counsel also elicited testimony from Dr. Farah about the possibility of medication-induced delusions. Moreover, like Dr. Parsons, Dr. Farah formed his expert opinion based on a review of Keller's medical records and without meeting with her personally.

The trial court did not err by overruling Keller's objection to Dr. Parsons's opinion testimony. But even if the trial court erred by permitting Dr. Parsons to base his expert opinion testimony entirely on Keller's medical records and the depositions taken in this case, such error would have been harmless, given Dr. Farah's similar testimony to which Keller did not object, and a portion of which she actually elicited. *See Union Cty. Bd. of Educ.*, 240 N.C. App. at 283, 771 S.E.2d at 596; *see also Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) ("A party may not complain of action which he induced." (citations omitted)).

### III. Exclusion of Earwood's Alleged Prior Assault

[4] Finally, Keller argues that the trial court erred by excluding evidence of an alleged prior assault by Earwood against another Deerfield resident. Specifically, Keller argues that the trial court's finding—that the prior incident during which Earwood allegedly choked another resident was not substantially similar to Keller's allegation of sexual assault—was not supported by the evidence. We disagree.

#### A. *Standard of Review*

"We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's

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Rule 403 determination for abuse of discretion.” *State v. Schmieder*, \_\_ N.C. App. \_\_, \_\_, 827 S.E.2d 322, 326 (citation omitted), *disc. review denied*, 372 N.C. 711, 830 S.E.2d 832 (2019).

Again, “evidentiary errors are considered harmless unless a different result would have been reached at trial.” *Union Cty. Bd. of Educ.*, 240 N.C. App. at 283, 771 S.E.2d at 596 (citation omitted). “[T]he burden is on the appellant to not only show error, but also to show that he was prejudiced and a different result would have likely ensued had the error not occurred.” *Outlaw*, 190 N.C. App. at 247, 660 S.E.2d at 561 (citation omitted).

*B. Analysis*

Rule 404(b) permits the admission of “evidence of other crimes, wrongs, or acts” for purposes *other than* to show that the defendant “acted in conformity therewith.” N.C. Gen. Stat. § 8C-1, Rule 404(b). Rule 404(b)

is a general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but *one exception* requiring its exclusion if its *only* probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged.

*Schmieder*, \_\_ N.C. App. at \_\_, 827 S.E.2d at 326 (citation and internal quotation marks omitted). “Such evidence may be admitted under this rule as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.” *Id.* (citation and internal quotation marks omitted).

At trial, Keller sought to introduce evidence of an alleged prior assault by Earwood against another Deerfield resident. Keller’s counsel explained the basis for introducing evidence of the alleged prior assault, noting that a jury could find that the alleged prior assault was “an incident similar enough to what happened here *to give some indication as to* [Earwood’s] *propensity* to engage in that kind of conduct[,]” and could determine that Earwood is a “dangerous person.” (Emphasis added).

Even assuming, *arguendo*, that the alleged acts were substantially similar, Keller’s sole purpose in proffering evidence of an alleged prior assault was to establish Earwood’s “propensity to engage in that kind of conduct.” Rule 404(b) explicitly requires the exclusion of evidence of other crimes, wrongs, or acts under these circumstances. Keller sought to admit evidence of Earwood’s alleged prior assault only to

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“prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it.” N.C. Gen. Stat. § 8C-1, Rule 404 cmt. Thus, the trial court did not abuse its discretion in excluding evidence of an alleged prior assault by Earwood.

**Conclusion**

For the reasons stated herein, we hold that the trial court did not err by (i) granting summary judgment in favor of Deerfield; (ii) admitting Dr. Parsons’s expert opinion testimony; or (iii) excluding evidence of a prior alleged assault offered solely for the improper purpose of demonstrating Earwood’s propensity to commit similar acts against Keller. Accordingly, we affirm.

**AFFIRMED.**

Judges MURPHY and ARROWOOD concur.

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MARISA MUCHA, PLAINTIFF

v.

LOGAN WAGNER, DEFENDANT

No. COA18-1133

Filed 2 June 2020

**1. Jurisdiction—personal—minimum contacts—nonresident ex-boyfriend—unaware of ex-girlfriend’s location when contacting her**

Where plaintiff—who attended college in South Carolina—sought a domestic violence protective order against defendant—her ex-boyfriend from Connecticut—after he called her twenty-eight times on the day she moved to North Carolina even though she asked him not to contact her, defendant established sufficient minimum contacts with North Carolina to support the trial court’s exercise of personal jurisdiction over him. Although defendant did not know plaintiff was in North Carolina when he called her, he knew her college semester had ended and that she might have left South Carolina; therefore, his conduct was sufficient for him to reasonably anticipate being haled into court wherever plaintiff resided when she received the calls. Moreover, the due process factors established by the Supreme Court weighed in favor of personal jurisdiction in North Carolina.

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**2. Appeal and Error—preservation of issues—personal jurisdiction—failure to argue or obtain ruling in trial court**

On appeal from the trial court's entry of a domestic violence protective order against defendant, a nonresident, on behalf of his ex-girlfriend, defendant failed to preserve for appellate review his argument that North Carolina's long-arm statute precluded the trial court's exercise of personal jurisdiction over him. Defendant neither asserted this argument before the trial court in his motion to dismiss for lack of personal jurisdiction nor obtained a ruling from the trial court on this issue.

Appeal by defendant from orders entered 13 June and 27 June 2018 by Judge Debra S. Sasser in Wake County District Court. Heard in the Court of Appeals 4 September 2019.

*Parrott Law PLLC, by Robert J. Parrott Jr., for defendant-appellant.*

*No appellee brief filed.*

*Erik R. Zimmerman and Andrew R. Wagner, court-appointed amicus curiae.*

DIETZ, Judge.

Logan Wagner and Marisa Mucha were in a relationship. Mucha ended the relationship and asked Wagner not to contact her again. At the time, Mucha was a college student in South Carolina and Wagner lived in Connecticut. Mucha later moved to North Carolina and, the day she moved, Wagner called her 28 times on her cell phone.

In one of the early calls, Mucha answered and told Wagner not to call her again. In a later call, Wagner left a voice message. When Mucha listened to the message, she suffered a panic attack. The next day, she filed a *pro se* complaint and motion for a domestic violence protective order in Wake County District Court.

Wagner appeared solely to contest personal jurisdiction. The trial court denied his motion to dismiss and entered a protective order. Wagner appealed.

As explained below, the trial court properly determined that it could exercise personal jurisdiction over Wagner. Although Wagner did not know at the time of the calls that Mucha moved from South Carolina to North Carolina that day, he knew that her semester of college had ended and she may no longer be residing there. Thus, his conduct—purposefully

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directed at Mucha—was sufficient for him to reasonably anticipate being haled into court wherever Mucha resided when she received the calls. Applying the due process factors established by the Supreme Court—the nature and context of Wagner’s contacts within our State; our State’s interest in protecting its residents from this sort of harmful interpersonal interaction; and the convenience to the parties, including Mucha’s need to call witnesses of the events who were with her in North Carolina at the time—we hold that a North Carolina court properly could exercise personal jurisdiction over Wagner in this action.

**Facts and Procedural History**

Marisa Mucha previously was in a relationship with Logan Wagner. That relationship ended in December 2017. Wagner lives in Connecticut. At the end of their relationship, Mucha lived in South Carolina where she was attending college, but she regularly traveled to Connecticut to visit her family.

In early 2018, while living in South Carolina, Mucha ceased contact with Wagner because she was having “severe panic attacks” and determined that contact from Wagner “would trigger those panic attacks.” Mucha told Wagner not to contact her again at some point in January 2018 and again in early May 2018.

Later in May, Wagner saw pictures of Mucha on social media that gave him “cause for concern.” One of the pictures, which is included in the record, contains captions indicating that Mucha had concluded “final exams” and that “this semester has truly been the worst.”

On 15 May 2018, between 10:00 p.m. and midnight, Mucha received a total of 28 phone calls on her cell phone. The calls all came from an unknown number. On the third or fourth call, Mucha answered her phone and asked who it was. It was Wagner. Mucha “got scared” and “hung up.” She answered one more time after that and told Wagner not to contact her again. Wagner continued calling and left a voicemail. After listening to the voicemail, Mucha had a panic attack.

Earlier that day, around 3:00 p.m., Mucha moved from South Carolina to North Carolina. The record does not contain any explanation of why Mucha moved but, as noted above, a social media post included in the record indicates that her college semester in South Carolina had ended.

The next day, Mucha filed a *pro se* complaint and motion for a domestic violence protective order in Wake County District Court. She explained that she sought a protective order because she was scared Wagner “was trying to find me – my location.”



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Wagner moved to dismiss Mucha's complaint for lack of personal jurisdiction. In an accompanying affidavit, he testified that he lives in Connecticut, has no connection to North Carolina, and did not know Mucha had moved to North Carolina until he received notice of her court filings.

On 13 June 2018, the trial court heard both Wagner's motion to dismiss and Mucha's motion for a domestic violence protective order. Wagner appeared solely to contest personal jurisdiction. Mucha testified about various jurisdictional facts, including her relationship with Wagner, her decision to cease contact with him, her efforts to inform him of that decision, the 28 phone calls she received on 15 May 2018 while living in North Carolina, and her resulting panic attack. Other witnesses who were present on the night of the calls also testified about Mucha's reaction and her panic attack.

After hearing the jurisdictional testimony, the trial court announced that it was denying Wagner's motion to dismiss because North Carolina "does have jurisdiction over Mr. Wagner" but explained to Wagner's counsel that "you can't appeal anything until it's reduced to writing and entered." After further testimony, the trial court announced that it was granting Mucha's motion for a domestic violence protective order. The trial court entered the protective order later that day. Two weeks later, on 27 June 2018, the trial court entered an order denying Wagner's motion to dismiss, accompanied by jurisdictional findings of fact and conclusions of law.

Wagner timely appealed. Mucha, who represented herself in the trial court, did not appear in the appellate proceedings or file an appellee's brief. Because of the importance of the jurisdictional questions Wagner raised in his briefing, this Court appointed *amicus curiae* to brief and argue in defense of the trial court's ruling.

**Analysis**

[1] Wagner argues that the trial court erred in denying his motion to dismiss for lack of personal jurisdiction because he did not have sufficient minimum contacts to subject him to personal jurisdiction in North Carolina. We reject this argument and hold that, based on the particular facts of this case, the trial court's finding of personal jurisdiction was supported by jurisdictional facts concerning Wagner's contacts with Mucha while she was present in our State.

When a trial court makes findings of fact in its ruling on a motion to dismiss for lack of personal jurisdiction, "our review is limited to

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whether the trial court's findings of fact are supported by competent evidence in the record and whether the conclusions of law are supported by the findings of fact." *State ex rel. Cooper v. Ridgeway Brands Mfg., LLC*, 188 N.C. App. 302, 304, 655 S.E.2d 446, 448 (2008). We review the trial court's conclusions of law concerning personal jurisdiction *de novo*. *Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 517, 597 S.E.2d 717, 721 (2004).

"To determine if foreign defendants may be subjected to personal jurisdiction in this State," we must "determine whether our courts can constitutionally exercise such jurisdiction consistent with due process of law." *Schofield v. Schofield*, 78 N.C. App. 657, 659, 338 S.E.2d 132, 133–34 (1986). Our courts can exercise this jurisdiction only if the defendant has sufficient "minimum contacts" with our State that "the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

This due process test "require[s] that individuals have fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). The "fair warning requirement" can be satisfied "if the defendant has purposefully directed his activities at residents of the forum, and the litigation results from alleged injuries that arise out of or relate to those activities." *Id.* (citations omitted). "[T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State." *Id.* at 474.

Because the test focuses on this purposeful availment, it has a foreseeability component. "[T]he foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* "[C]ourts in appropriate case[s] may evaluate the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several States in furthering fundamental substantive social policies. These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Id.* at 477 (citation omitted). In short, this jurisdictional analysis does not lend itself to bright-line rules; whether sufficient contacts exist "depends upon the particular facts of each individual case." *Saxon v. Smith*, 125 N.C. App. 163, 173, 479 S.E.2d 788, 794 (1997).

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Wagner frames the issue in this case as one involving his lack of knowledge of Mucha's physical location. Wagner had no contacts with North Carolina beyond the 28 phone calls he made to Mucha's phone the day she moved to our State. And he contends that "he had no reason to think Mucha was in North Carolina at the time of those alleged phone calls" because his only information about her whereabouts was that she was a full-time college student in South Carolina. Thus, he argues, he had "no reason to expect that he could be sued in North Carolina."

Were the facts in this case consistent with Wagner's framing of them, it would be a closer case. But the record does not support Wagner's claim that he had no reason to expect Mucha would be anywhere other than South Carolina. Wagner's own affidavit demonstrates that he was aware Mucha was an out-of-state student at her university, that her family lived in another state, that she "regularly made trips" to visit her family, and that the spring semester had ended. Some university students remain on the campus during the summer, but many do not. They return home or travel elsewhere away from campus. Thus, it was not reasonable for Wagner to assume that the only place Mucha could be when he called her cell phone that night was in South Carolina, where her university was located.

We thus agree with the *amicus* that the fact that Wagner did not know Mucha was in North Carolina when he made the calls does not, by itself, preclude North Carolina's courts from exercising personal jurisdiction. Instead, the jurisdictional analysis depends on weighing and balancing the factors established by the Supreme Court to assess whether Wagner purposefully established sufficient minimum contacts with North Carolina to subject him to personal jurisdiction here. We therefore examine those factors and assess whether they support the trial court's determination.

Our courts have separated the Supreme Court's due process analysis into five discrete factors: "(1) the quantity of the contacts; (2) the quality and nature of the contacts; (3) the source and connection of the cause of action to the contacts; (4) the interests of the forum state, and (5) the convenience to the parties." *Cooper v. Shealy*, 140 N.C. App. 729, 734, 537 S.E.2d 854, 858 (2000). We address these factors in turn below.

First, we examine the quantity of contacts. Wagner made 28 separate calls to Mucha's cell phone, most of which occurred after Mucha already answered once, determined the caller was Wagner, and told him not to call her again. These multiple, repeated phone calls, particularly after being told not to call, are "substantial" and weigh in favor of

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exercising personal jurisdiction. *Brown v. Ellis*, 206 N.C. App. 93, 100, 696 S.E.2d 813, 819 (2010).

We next examine the quality and nature of these calls. As noted above, the calls continued even after Mucha asked Wagner not to call her again. The calls caused Mucha to feel “scared” and, after listening to a voice message left during one of the calls, Mucha suffered a panic attack. Although the content of that voice message is not available in the record, the evidence received by the trial court demonstrated that these calls were harmful to Mucha and she wanted them to stop. These harmful effects that the 28 phone calls had on Mucha, while she was present in North Carolina, likewise support the exercise of personal jurisdiction. *See id.*

Next, we consider the source and connection of the cause of action to the contacts. This factor strongly supports exercising personal jurisdiction. It was Wagner’s 28 unwanted calls to Mucha’s cell phone that caused her the harm that, in turn, led her to seek a protective order from North Carolina’s courts. The calls occurred late in the evening and Mucha sought relief from the court the next day. This creates a powerful connection between the North Carolina contacts and the legal action in North Carolina’s courts.

The next factor is the interests of the forum state. Here, too, the factor weighs in favor of jurisdiction. We have held that “North Carolina has a strong interest in protecting its citizens from local injury caused by the tortious conduct of foreign citizens.” *Cooper*, 140 N.C. App. at 735, 537 S.E.2d at 858. Our State has the same strong interest in protecting its residents from interpersonal violence or harassment stemming from domestic relationships.

Finally, we consider the convenience to the parties. Admittedly, North Carolina is an inconvenient forum for Wagner, who lives in Connecticut and has no ties to North Carolina. But Mucha lives in North Carolina and so, too, do the witnesses she called to support her legal claim. In similar situations, this Court has determined that, although this factor may not decisively weigh in favor of exercising jurisdiction, it does not preclude jurisdiction when the other factors support it. *See Brown*, 206 N.C. App. at 101, 696 S.E.2d at 819.

In sum, when Wagner purposefully called Mucha 28 times in a single night, repeating the calls even after she answered and asked him not to call her again, he established sufficient minimum contacts with North Carolina to support the exercise of personal jurisdiction. Although Wagner may not have known Mucha moved to North Carolina earlier

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that day, his conduct—directed at Mucha personally—was sufficient for him to reasonably anticipate being haled into court wherever Mucha resided when she received the calls. *See A.R. v. M.R.*, 351 N.J. Super. 512, 520, 799 A.2d 27, 31–32 (App. Div. 2002) (finding personal jurisdiction in claimant’s request for a protective order where the defendant “repeatedly placed telephone calls into this state in his search for her”). Considering the nature and context of Wagner’s calls to Mucha and our State’s interest in protecting its residents from this sort of harmful interpersonal interaction, we hold that a North Carolina court exercising personal jurisdiction over Wagner in an action for a domestic violence protective order “does not offend traditional notions of fair play and substantial justice.” *Int’l Shoe Co.*, 326 U.S. at 316.

But we emphasize that this is a close case and our holding is bound to these specific facts, where there was evidence that Wagner had some knowledge of the particular circumstances of Mucha’s life and the possibility that, when he called her cell phone, she could be in many different possible locations. *See Saxon*, 125 N.C. App. at 173, 479 S.E.2d at 794. In another case, on different facts, phone calls to the cell phone of a person in an unknown location may not be sufficient to meet the due process requirements of personal jurisdiction. *See Mannise v. Harrell*, 249 N.C. App. 322, 331, 791 S.E.2d 653, 659 (2016).

**[2]** Wagner also argues that the trial court erred because exercising personal jurisdiction on these facts is not permitted by North Carolina’s long-arm statute. *See* N.C. Gen. Stat. § 1-75.4. The *amicus* contends that this issue is not preserved for appellate review because Wagner did not assert it in his motion to dismiss nor secure a ruling on this issue from the trial court in the challenged order. We agree that the trial court did not address this issue either in its oral ruling or its written order. “In order to preserve an issue for appellate review . . . [i]t is also necessary for the complaining party to obtain a ruling upon the party’s request, objection, or motion.” N.C. R. App. P. 10(a)(1). Thus, we are unable to engage in appellate review of this issue.

**Conclusion**

For the reasons discussed above, we affirm the trial court’s orders.

**AFFIRMED.**

Judges ZACHARY and YOUNG concur.

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[271 N.C. App. 644 (2020)]

SARAH RICHTER, PLAINTIFF

v.

ALLEN RICHTER, DEFENDANT

No. COA19-442

Filed 2 June 2020

**Divorce—equitable distribution—property classification—life insurance proceeds—gift**

In an equitable distribution action, the trial court properly classified as separate property assets purchased or funded with life insurance proceeds received by a husband during the marriage, where circumstances of the transfer gave rise to a reasonable inference that the proceeds constituted a gift. The policy was purchased by the husband's former wife (with whom he had two children), the husband had not paid any of the premiums for the policy, and he was listed as the sole beneficiary.

Appeal by plaintiff from order entered 29 November 2018 by Judge Edward L. Hedrick, IV in District Court, Iredell County. Heard in the Court of Appeals 30 October 2019.

*Pope McMillan, P.A., by Clark D. Tew, for plaintiff-appellant.*

*Lake Norman Law Firm, by Adam G. Breeding, for defendant-appellee.*

STROUD, Judge.

At issue is whether the trial court erred in classifying proceeds from a life insurance policy on the life of Husband's former wife, paid to Husband during his marriage to Wife, as a gift to Husband and thus his separate property. Based upon this classification of the life insurance proceeds, the trial court also classified other assets acquired with the proceeds as Husband's separate property. Where Husband did not own the life insurance policy and paid no premiums for the policy during the parties' marriage, the trial court did not err by classifying the proceeds as a gift to Husband. The trial court's findings of fact are supported by the evidence and those findings support the trial court's conclusion of law classifying the disputed assets as Husband's separate property, so we affirm the trial court's order.

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**I. Background**

The parties married on 16 April 2011. Husband had been previously married to Jeanne Richter with whom he had two children. Husband and Wife had one child in 2012. During the parties' marriage, Jeanne Richter passed away, and proceeds from her life insurance policy in the amount of \$500,603.68 were paid to Husband ("life insurance proceeds"). Wife filed a complaint in December 2016 with claims for child custody and support, divorce from bed and board, postseparation support and alimony, and counsel fees. Because the parties had not yet separated, Wife also noted her intent to file for equitable distribution after their separation.

On 10 February 2017, the parties separated. Husband then filed his answer and counterclaims for custody, child support, and equitable distribution. On 18 April 2017, Wife filed an amended complaint including a claim for equitable distribution. Both parties sought distribution of their marital property.

Husband listed the following items as his separate property on his equitable distribution affidavit based upon his claim that they were purchased with the life insurance proceeds: real property in Mooresville ("Fieldstone house"), a Prudential Alliance Account, a Prudential Retirement B Annuity, and a Prudential IRA (collectively, "the disputed assets"). The life insurance proceeds from his former wife were initially deposited into the Prudential Alliance Account. Prior to the parties' separation, Husband transferred money from the Alliance Account to establish the IRA and the Retirement Annuity Account. For purposes of clarity and because these were the accounts the trial court classified, we will refer to these accounts respectively as the Alliance Account, the IRA, and the Annuity Account.

In a pretrial order for equitable distribution, the parties listed the Fieldstone house under Schedule E, which was defined as "items as to which there is disagreement as to whether the item is marital property or a marital debt." Wife alleged the real property was "purchased with comingled funds" and should be classified as marital; Husband alleged it should be classified as separate. The IRA and Annuity Account were also listed on Schedule E, with Wife alleging they should be classified as marital and Husband alleging they were his separate property. The Alliance Account was listed on Schedule H, "Items agreed by parties as Husband's separate property" because "Husband acquired during marriage from deceased ex-wife."

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The equitable distribution claims were heard before the Honorable Edward L. Hedrick, IV on 26 and 28 September, and 1 October 2018 in District Court, Iredell County. The trial court found the Alliance Account, the IRA, and the Annuity Account were established entirely from the life insurance proceeds and were therefore the separate property of Husband. The trial court classified the Fieldstone house as part marital and part Husband's separate property. Husband purchased the home with the life insurance proceeds, but the parties made improvements to the house during the marriage which increased the value. Wife timely appealed.

**II. Classification of Life Insurance Proceeds**

Wife argues the trial court erred in classifying the life insurance proceeds and property acquired with the life insurance proceeds during the marriage as Husband's separate property. Husband disagrees with Wife's framing of the issue as classification of the life insurance "proceeds" since some of the proceeds had been transferred to other accounts and contends the parties stipulated in the pretrial order that the Alliance Account was his separate property, and since the other assets came from the Alliance Account, this stipulation resolved the classification of all of the disputed assets, including the Fieldstone house, the IRA, and the Annuity Account. Husband's argument is logically based upon the evidence and theories presented by Wife at trial, but the pretrial order's stipulation is not so broad as he claims. And although Wife's evidence at trial focused primarily on whether Husband had converted separate funds from the life insurance proceeds to marital property by comingling assets, Wife is correct that the issue on appeal is "not whether the purportedly separate property of the Defendant was, through his actions or intentions, converted into marital property . . . but whether or not the Life Insurance Proceeds were the Defendant's separate property to begin with."

**A. Standard of Review**

"Pursuant to N.C. Gen. Stat. § 50-20 [ (2017) ], equitable distribution is a three-step process requiring the trial court to '(1) determine what is marital [and divisible] property; (2) find the net value of the property; and (3) make an equitable distribution of that property.'" Under North Carolina law, marital property is "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except



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property determined to be separate property or divisible property[.]” Separate property is that acquired by a spouse before marriage, or acquired by devise, descent, or gift during the marriage. Generally, divisible property refers to certain property received after the date of separation but prior to distribution.

*Crago v. Crago*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 834 S.E.2d 700, 704 (2019) (alterations in original) (citations omitted), *review denied*, \_\_\_ N.C. \_\_\_, 838 S.E.2d 181 (2020).

Wife challenges some of the trial court’s findings of fact and the conclusion of law classifying the assets acquired with the life insurance proceeds.

On appeal, when reviewing an equitable distribution order, this Court will uphold the trial court’s written findings of fact “as long as they are supported by competent evidence.” However, the trial court’s conclusions of law are reviewed *de novo*. Finally, this Court reviews the trial court’s actual distribution decision for abuse of discretion.

*Mugno v. Mugno*, 205 N.C. App. 273, 276, 695 S.E.2d 495, 498 (2010) (citations omitted).

**B. Effect of Stipulation Regarding Alliance Account**

Both parties devote much of their briefs to a dispute regarding the meaning and effect of the stipulation in the pretrial order regarding the classification of the Alliance Account as Husband’s separate property. Husband contends this stipulation covers not only the Alliance Account but also the Fieldstone house, the IRA, and the Annuity Account, since funds from the Alliance Account were used during the marriage to acquire each of these assets. Wife contends the stipulation does not apply to any asset other than the Alliance Account, but she also argues that the trial court improperly relied upon the stipulation in classifying the other disputed assets, based upon the trial court’s statement in Finding of Fact 30, “This finding is consistent with the parties’ stipulation regarding the funds remaining in the Alliance Account pursuant to Section H of the Pretrial Equitable Distribution Order.” Both parties assign far more importance to the stipulation than it deserves, and, instead of simplifying the issues, their arguments regarding the stipulation have made the one classification issue presented on appeal more complex.

In the parties’ equitable distribution affidavits, both clearly identified each of the disputed assets individually—the Alliance Account, the

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IRA, the Annuity Account, and the Fieldstone house—and stated their contentions regarding the value, classification, and desired distribution for each asset. Although the “life insurance proceeds” are mentioned as the source of the assets, the life insurance proceeds themselves had been received in April 2014, and Husband used the proceeds to acquire or establish the disputed assets. Likewise, in the pretrial order, the parties stipulated that “Husband’s Prudential Alliance account” should be classified as the separate property of Husband. The pretrial order also listed the other disputed assets as individual assets and included the parties’ contentions regarding each one. “It is well-established that stipulations in a pretrial order are binding upon the parties and upon the trial court.” *Clemons v. Clemons*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 828 S.E.2d 501, 505 (2019). Husband argues that Wife stipulated that all property acquired with funds originally in the Alliance Account—the entire life insurance proceeds—would be his separate property. Thus, he argues that there is no need to consider the classification of the Fieldstone house, the IRA, and Annuity Account—all would be his separate property because they flowed from the Alliance Account and this was stipulated to be his separate property. However, the stipulation regarding the Alliance Account was a stipulation only to the classification and value of that particular account as of the date of separation. Neither the pretrial order nor the trial court’s equitable distribution order classified the life insurance proceeds as a discrete asset existing on the date of separation; this is appropriate, since Husband received the life insurance proceeds in April 2014 but the parties separated on 10 February 2017. The trial court is required to classify and value property existing as of the date of separation. *Robinson v. Robinson*, 210 N.C. App. 319, 323, 707 S.E.2d 785, 789 (2011). Both the pretrial order and equitable distribution order addressed the various assets existing as of the date of separation, including those acquired with the life insurance proceeds. Husband is correct that Wife is bound by the stipulation as to the classification of the Alliance Account as listed on the pretrial order. But the other accounts and Fieldstone house were clearly listed separately on the pretrial order and the parties did not agree on the classification of those assets. The stipulation regarding the Alliance Account did not require the trial court to classify all of the disputed assets as Husband’s separate property and does not prevent Wife’s challenge to the trial court’s classification of the Fieldstone house, the IRA, and Annuity Account. The stipulation only applies to the Alliance Account, which the trial court properly classified as Husband’s separate property based upon the stipulation.

Wife argues the trial court improperly relied upon the stipulation as part of its classification of the disputed assets. We will address the

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classification issue in more detail below, but upon consideration of all of the findings in context, the trial court did not classify the disputed assets based upon the stipulation regarding the Alliance Account. The trial court simply noted the classification of the other disputed assets as separate property (or partially separate, as to the Fieldstone house) was consistent with the stipulation but there is no indication the trial court relied upon the stipulation to classify any asset other than the Alliance Account.

**C. Findings of Fact**

Wife challenges several findings of fact regarding the life insurance proceeds and properties acquired with the proceeds. The findings address the source of the insurance proceeds and then the acquisition of other properties with the proceeds. The first finding challenged, Finding 30, includes both findings of fact regarding Husband's receipt of the insurance proceeds and conclusions of law regarding the classification as separate property. We will first address the factual portion of Finding of Fact 30, as most of the other findings and conclusions relevant to the issues on appeal rely upon these factual findings. The trial court found as follows:

30. Before Defendant was married to the Plaintiff, he was married to Jeanne K. Richter. With Jeanne Richter, the Defendant had two children, now aged 15 and 13. On or about August 27, 2013 Jeanne Richter executed a will acknowledging that she was divorced and leaving all of her property to the children of Defendant and Jeanne Richter. On or about March 28, 2014, Jeanne Richter appointed the Defendant her attorney in fact. On March 31, 2014 Jeanne Richter died. Defendant was the beneficiary of a life insurance policy on her life and as a result of her death, the Defendant received \$500,603.88 on or about April 9, 2014 which was disbursed to a Prudential Alliance Account. These funds were acquired during the marriage and some of the funds as well as items purchased with the funds existed on the date of separation. They were not acquired by devise (by will) or by descent (Defendant was not related to Jeanne Richter at the time of her death).

The portion of Finding of Fact 30 quoted above includes findings of fact, and these are supported by competent evidence. Indeed, the basic facts as Husband's prior marriage and divorce, the date of Mrs. Richter's death, and Husband's receipt of the insurance proceeds are not disputed. It is also undisputed that the insurance proceeds were not

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acquired by will or descent. The dispute is whether the trial court erred in classifying the life insurance proceeds as a gift under North Carolina General Statute § 50-20(b)(2).

Wife also challenges Findings of Fact 31, 32, 33, 39, 40, 48, 49, and 50. But the basis for her challenge to each of these findings is the same as to Finding 30. Findings 31 through 33 address the marital and separate contributions to the Fieldstone house, based upon the prior finding that Husband used his separate funds from the insurance proceeds to purchase the house.<sup>1</sup> Findings 39 and 40 address the IRA and Annuity Account, which were established entirely with funds from the insurance proceeds. Findings 48, 49, and 50 include listings of the classifications and values of all the parties' property, including the disputed assets previously addressed in the prior findings. Thus, because the factual findings of Finding 30 are supported by competent evidence, the remaining findings challenged by Wife are also supported by the evidence.

**D. Classification of Property**

The remainder of Finding of Fact 30 is actually a conclusion of law, as it addresses classification of the assets acquired with the life insurance proceeds. We review the conclusion of law *de novo*. *Robbins v. Robbins*, 240 N.C. App. 386, 396, 770 S.E.2d 723, 729 (2015) ("Because the classification of property in an equitable distribution proceeding requires the application of legal principles, this determination is most appropriately considered a conclusion of law." (quoting *Hunt v. Hunt*, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993))). "While findings of fact by the trial court in a non-jury case are conclusive on appeal if there is evidence to support those findings, conclusions of law are reviewable *de novo*." *Id.* at 395, 770 S.E.2d at 728 (citing *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004)).

North Carolina General Statute § 50-20 defines "separate property" in pertinent part as follows:

"Separate property" means all real and personal property acquired by a spouse before marriage or acquired by a spouse by devise, descent, or gift during the course of the marriage. . . . Property acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife

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1. The trial court held the Fieldstone house was partially separate and partially marital, based upon marital contributions to renovation of the house. Wife challenges the findings of fact and classification of the Fieldstone house only as to the separate component based upon Husband's purchase of the house with the life insurance proceeds.

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or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance. The increase in value of separate property and the income derived from separate property shall be considered separate property.

N.C. Gen. Stat. § 50-20(b)(2) (2019).

The remainder of Finding of Fact 30 addresses the source of the funds in the IRA and Annuity Account and for the purchase of the Fieldstone house and includes the trial court's conclusion of law as to classification of the disputed assets. The trial court concluded that the insurance proceeds were a gift to Husband, as follows:

30. . . . However, these funds [the life insurance proceeds] were acquired by the Defendant by gift. Although the actual trigger for the transfer may have been a contractual obligation of Prudential to Jeanne Richter; Defendant's position as the beneficiary of the contract was without consideration paid by Plaintiff or Defendant to Jeanne Richter or to Prudential. This \$500,603.68 was received by Defendant during his marriage to the Plaintiff from a third party without consideration of the Plaintiff or Defendant and is therefore a gift and is therefore Defendant's separate property. This finding is consistent with the parties' stipulation regarding the funds remaining in the Alliance Account pursuant to Section H of the Pretrial Equitable Distribution Order.

Because this portion of Finding 30 applies legal analysis to the facts and draws the conclusion that the insurance proceeds should be classified as a gift to Husband and thus his separate property under North Carolina General Statute § 50-20(b)(2) we review this conclusion *de novo*. *Blair v. Blair*, 260 N.C. App. 474, 478, 818 S.E.2d 413, 417 (2018) (“[T]he labels ‘findings of fact’ and ‘conclusions of law’ employed by the trial court in a written order do not determine the nature of our review. If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that ‘finding’ *de novo*.” (quoting *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012))).

This Court has very recently addressed the issue of classification of life insurance proceeds on the former spouse of a party in *Crago*, \_\_\_ N.C. App. \_\_\_, 834 S.E.2d 700. Although the life insurance policy at issue here is different from *Crago* because there was no marital contribution

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to the premiums and neither party owned the policy, this Court's analysis of the question helps highlight the factors relevant to the classification of insurance proceeds.

In *Crago*, the defendant-wife was married previously to Mr. Heintz and they had two children. *Id.* at \_\_\_, 834 S.E.2d at 703. In 2004, defendant-wife and Mr. Heintz took out a \$1,000,000 life insurance policy on his life, naming defendant-wife as beneficiary. *Id.* at \_\_\_, 834 S.E.2d at 703. Defendant-wife and Mr. Heintz separated and later divorced. *Id.* at \_\_\_, 834 S.E.2d at 703. In 2007, Defendant-wife married plaintiff-husband, Mr. Crago. *Id.* at \_\_\_, 834 S.E.2d at 703. The defendant-wife continued to pay premiums on the life insurance policy on Mr. Heintz during her marriage to Mr. Crago. *Id.* at \_\_\_, 834 S.E.2d at 703. She used marital funds to pay the premiums on the life insurance policy. *Id.* at \_\_\_, 834 S.E.2d at 703. In 2015, Mr. Heintz died, and defendant-wife received the life insurance proceeds. *Id.* at \_\_\_, 834 S.E.2d at 703. In 2016, she and plaintiff-husband separated. *Id.* at \_\_\_, 834 S.E.2d at 703. In their equitable distribution order, the trial court determined the life insurance proceeds were marital property, and this Court affirmed. *Id.* at \_\_\_, 834 S.E.2d at 710.

The *Crago* Court first rejected an "analytic" approach to the classification of the insurance proceeds. *Id.* at \_\_\_, 834 S.E.2d at 704. The defendant-wife argued the analytic approach should be used based upon the fact that the insurance proceeds were intended for the benefit of the minor children of her marriage to Mr. Heintz. *Id.* at \_\_\_, 834 S.E.2d at 704-05. The Court determined the "mechanistic" approach must be used:

North Carolina courts have adopted two different approaches for determining what is marital and separate property: the "mechanistic" approach and the "analytic" approach. In *Johnson v. Johnson*, our Supreme Court described the mechanistic approach as:

literal and looks to the general statutory definitions of marital and separate property and concludes that since the award was acquired during the marriage and does not fall into the definition of separate property or into any enumerated exception to the definition of marital property, it must be marital property.

In contrast, "[t]he analytic approach asks what the award was intended to replace," focusing on the purpose of the compensation rather than its statutory definition.

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In support of her argument the trial court erred by not applying the analytic approach, defendant cites several cases concerning classification of personal injury settlements and disability benefits. However, defendant also acknowledges North Carolina courts have never applied this approach in the context of life insurance proceeds. Nevertheless, she urges us to adopt the analytic approach in this case, based on “important public policy considerations” surrounding whether life insurance proceeds intended to benefit a spouse’s children from another marriage should be considered marital property. Furthermore, she argues *Foster* is distinguishable from the present case and therefore should not be binding on this Court.

In *Foster*, the husband and wife had purchased a life insurance policy on their children during their marriage. After the parties separated, the husband alone paid the premiums for the policy. During the separation period, one of the children passed away and the life insurance proceeds were paid and placed in a trust account. In divorce proceedings, the wife claimed the life insurance proceeds were a marital asset because some of the policy premiums had been paid for with marital funds. We disagreed, holding that because the claim for death benefits did not arise until after separation, when their son passed away, the policy proceeds were the husband’s separate property. In making our ruling, we noted that, pursuant to N.C. Gen. Stat. § 50-20, “in order for property to be considered marital property it must be ‘acquired’ before the date of separation and must be ‘owned’ at the date of separation.”

Defendant argues the present case is distinguishable from *Foster* because that case concerned a life insurance policy on the lives of the parties’ own children, whereas the policy in dispute here covered the life of her ex-husband and was intended to be used to care for her children from her prior marriage. However, the relevant fact under the mechanistic approach we applied in *Foster* was whether the property was acquired before the date of separation, not who the policy covered or what its intended purpose was.

*Id.* at \_\_\_, 834 S.E.2d at 704-05 (alteration in original) (citations omitted).



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Here, the trial court stated its rationale as follows:

Defendant's position as the beneficiary of the contract was without consideration paid by Plaintiff or Defendant to Jeanne Richter or to Prudential. This \$500,603.68 was received by Defendant during his marriage to the Plaintiff from a third party without consideration of the Plaintiff or Defendant and is therefore a gift and is therefore Defendant's separate property. This finding is consistent with the parties' stipulation regarding the funds remaining in the Alliance Account pursuant to Section H of the Pretrial Equitable Distribution Order.

The trial court's finding of fact that the parties paid no consideration for the insurance policy is supported by record. There was no evidence any premiums were paid by Husband during the marriage, so there was no marital financial contribution to the life insurance. This is an important factual difference between this case, *Crago*, and *Foster v. Foster*, 90 N.C. App. 265, 368 S.E.2d 26 (1988).

In *Crago*, this Court rejected the defendant-wife's argument that the life insurance proceeds should be classified as partially separate based upon the source of funds for the premiums. *Crago* \_\_ N.C. App. at \_\_, 834 S.E.2d at 705. She argued that some of the funds in the account she used to pay the premiums were her separate property, so the proceeds should be classified as part separate and part marital using the source-of-funds approach. *Id.* at \_\_, 834 S.E.2d at 706. But the Court rejected this approach because the defendant-wife had failed to trace the funds in the account from which she paid the premiums and thus did not prove she had paid any premiums, particularly the "last life insurance premium," with her separate funds. *Id.* at \_\_, 834 S.E.2d at 706. Since all of the premiums paid during the marriage were from marital funds, this Court affirmed the trial court's rejection of the source-of-funds approach to classification of the insurance proceeds. *Id.* at \_\_, 834 S.E.2d at 706 ("Accordingly, the trial court's finding that the account ending in 3207 was marital, and thus the funds used to pay the last life insurance premium were marital, was not an abuse of discretion.").

The analysis of the source-of-funds issue in *Crago* and its reliance upon *Foster* and *McIver v. McIver*, 92 N.C. App. 116, 124, 374 S.E.2d 144, 149 (1988), shows that the holding was based not just upon the fact that the insurance proceeds were received during the marriage and owned on the date of separation, but also on the fact that the "last insurance premium" was paid with marital funds. *Crago*, \_\_ N.C. App. at \_\_, 834 S.E.2d at 706; see *McIver*, 92 N.C. App. at 124, 374 S.E.2d at 149-50



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(“North Carolina has adopted the ‘source of funds’ rule in determining whether property is marital or separate. Under the source of funds analysis, property is ‘acquired’ as it is paid for, and thus may include both marital and separate ownership interests. Under the rule, property acquired with separate funds prior to marriage remains separate, and is not converted to marital property merely because it was purchased in anticipation of marriage.” (citation omitted)). Here, Husband did not pay for the life insurance policy at all. This factual difference in the payment of premiums and policy ownership between this case, *Crago*, and *Foster* is essential to the classification issue.

In this case, no insurance premiums on the former Mrs. Richter’s life were paid from marital funds or by Husband during the marriage. The trial court found that Husband received the life insurance proceeds “from a third party without consideration of the Plaintiff or Defendant.” Husband was the beneficiary of the policy but not the owner, and he did not pay premiums on the policy during the marriage, so there was *no* marital contribution to the acquisition or maintenance of the policy, as in *Crago* and *Foster*.

This Court also addressed the source of funds in *Foster*, 90 N.C. App. 265, 368 S.E.2d 26. It is easy to overlook the portion of *Foster* which addresses the cash value of the policy as of the date of separation, which was only \$20.00, but this part of the analysis is important. In *Foster*, a portion of the policy value was classified as marital based upon the payment of premiums during the marriage, but as of the date of separation, the only value attributable to the marriage was the cash value. *Id.* The insurance policy on the child’s life had a cash value of \$20.00 as of the date of separation. *Id.* The insured child died after the parties’ separation, and the husband was the beneficiary of the policy and had continued to pay premiums after the date of separation. *Id.* The *Foster* Court noted the fact that the right to collect under the policy vested only upon the child’s death, after the date of separation, but did not classify the policy as entirely separate. *Id.* at 268, 368 S.E.2d at 28. Instead, *Foster* held that the insurance proceeds had a dual classification. *Id.* The \$20.00 cash value was classified as marital, based upon the value of the policy as of the date of separation; the \$20,000 proceeds for the child’s accidental death were classified as husband’s separate property based upon the vesting of the benefits after separation *and* the husband’s payment of premiums on the policy after separation. *Id.* The *Foster* Court based this analysis on a comparison to the vesting of stock options:

In *Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987), this Court held that stock options which were vested

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prior to separation were marital property but those which had not vested prior to separation were separate property. In the present case, at the time of separation there were no vested rights under the insurance policy on the life of Richie M. Foster. The rights only vested at the death of Richie M. Foster, and until then plaintiff, as owner of the policy, could have cancelled the policy or changed the beneficiary. At the time of separation, the cash value of the insurance policies was marital property since the premiums to that point had been paid for with marital assets. The premiums after separation were paid for with plaintiff's assets and therefore the proceeds from the insurance policy were separate property of plaintiff.

*Id.*

Therefore, although life insurance does not fit neatly into the methods of classification used for other assets such as real estate, and life insurance policies of different types will present different factual issues, it is clear that our Courts have applied the same legal analysis to the classification of life insurance policies as other assets. In *Foster*, the vested cash value of the whole life policy as of the date of separation was classified as marital, *id.*; a term life insurance policy normally has no cash value. In *Crago*, this Court affirmed the trial court's determination that the premiums paid during the marriage were paid from marital funds and classified the proceeds as marital based upon a source-of-funds approach. \_\_\_ N.C. App. \_\_\_, 834 S.E.2d 700. Although *Crago* does not address whether the life insurance policy at issue was a term policy with no cash value, a whole life policy with a cash value, or some other form of policy, *Crago* rejected classification as separate property of the wife based upon a source-of-funds approach because defendant-wife failed to show premiums were paid with her separate funds.<sup>2</sup> *See id.*

This case is different from both *Foster* and *Crago* because there was absolutely no marital contribution to the life insurance policy. It was not an asset purchased by either party, either during the marriage or after separation. Husband's former wife owned and paid for the life insurance policy until her death. Although no prior North Carolina case has ever characterized life insurance proceeds as a gift for purposes of

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2. Based upon the facts and analysis in *Crago*, the life insurance policy was apparently a term policy. *See Crago v. Crago*, \_\_\_ N.C. App. \_\_\_, 834 S.E.2d 700. There was no mention of any cash value for the policy. *See id.*

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equitable distribution, no case has ever addressed insurance proceeds owned and paid for by a third party but received during the marriage by one of the spouses. Thus, we will rely upon cases classifying gifts from third parties during the marriage to review the trial court's conclusion the proceeds were a gift and thus Husband's separate property.

Wife agrees we should rely upon cases regarding gifts from a third party but argues the trial court erred in classifying the life insurance proceeds as a gift because Husband failed to present evidence of "donative intent" by Husband's former wife. She contends this case does not present an issue of first impression, as Husband argues, because "Appellant is actually asking this Court to apply its usual and customary gift analysis for an asset; the lack of case law specifically discussing this one asset type does not a case of first impression make." We agree we can apply the "usual and customary gift analysis" but that analysis is more straightforward for some assets than others. As discussed earlier, life insurance policies may be classified differently depending upon the type of policy, policy ownership, payment of premiums, vesting of the right to proceeds, and the relationship of the insured to the beneficiary. And no prior case in North Carolina has addressed life insurance proceeds from a policy on the life of a third party where the beneficiary-spouse paid no consideration for the policy.

Under the gift analysis discussed in *Burnett v. Burnett*, 122 N.C. App. 712, 471 S.E.2d 649 (1996), Husband had the burden of showing that the life insurance proceeds were his separate property. The *Burnett* Court discussed several factors which may show donative intent, and these factors may vary based upon the particular type of property in question:

The party claiming a certain classification has the burden of showing, by the preponderance of the evidence, that the property is within the claimed classification. Thus a party claiming property acquired during the marriage to be separate, on the basis that it was a gift, has the burden of showing that the "alleged donor intended to transfer ownership of the property without receiving any consideration in return." . . .

"The evidence most relevant in determining donative intent [or the lack of donative intent] is the donor's own testimony." Other evidence relevant to donative intent includes the testimony of the alleged donee, documents surrounding the transaction, whether a gift tax return was filed, and whether an excise tax was paid. Transfer

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documents stating that the property is a gift or characterizing the consideration as love and affection is strong evidence of donative intent. On the other hand, transfer documents indicating receipt of consideration is *prima facie* evidence that the recited consideration was indeed paid. A mere recital of consideration, however, does not compel a finding that consideration was received, if other evidence reveals that no consideration was in fact received. Bargain sales, or those where some small consideration is received in exchange for the transfer, if accompanied with donative intent, are treated as partial gifts.

*Burnett*, 122 N.C. App. at 714-15, 471 S.E.2d at 651-52 (second alteration in original) (footnote omitted) (citations omitted).

Wife argues Husband failed to present evidence of “donative intent” citing to several cases addressing gifts of various types of property in different factual settings. For example, in *Berens v. Berens*, this Court held that the parties’ contributions to their children’s 529 accounts were not “gifts” to the children, noting that

“[i]n order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery.” “These two elements act in concert, as the present intention to make a gift must be accompanied by the delivery, which delivery must divest the donor of all right, title, and control over the property given.”

260 N.C. App. 467, 469-70, 818 S.E.2d 155, 157-58 (2018) (citation omitted) (quoting *Courts v. Annie Penn Mem’l Hosp., Inc.*, 111 N.C. App. 134, 138, 431 S.E.2d 864, 866 (1993)). The *Berens* Court explained:

Applying this settled property law principle, the parties’ contributions to their 529 Savings Plans were not gifts. In their briefs, both parties discuss various tax implications of 529 Savings Plan contributions at length. But the treatment of these plans for tax purposes does not control the determination of ownership under the equitable distribution statute. Instead, we look to whether the parties delivered an ownership interest in those funds to their children, thereby divesting themselves of that interest.

They did not.

*Berens*, 260 N.C. App. at 470, 818 S.E.2d at 158 (citation omitted).

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As recognized by *Berens*, treatment of property for tax purposes or in another legal context may not control its classification for purposes of equitable distribution. *Id.* Indeed, classifying property based upon marital contribution instead of title or other legal principles is one of the fundamental principles of the equitable distribution statute. *Hill v. Hill*, 229 N.C. App. 511, 518, 748 S.E.2d 352, 358 (2013) (“One of the purposes of the Equitable Distribution Act was ‘to alleviate the unfairness of the common law [title theory] rule’ and to base property distribution upon ‘the idea that marriage is a partnership enterprise to which both spouses make vital contributions . . . [.]’” (first and second alterations in original) (quoting *Friend–Novorska v. Novorska*, 131 N.C. App. 508, 510, 507 S.E.2d 900, 902 (1998))).

In *Plymouth Pallet Co. v. Wood*, this Court stated the elements of a gift between living persons:

The essential elements of a gift *inter vivos* are: (1) the intent by the donor to give the donee the property in question so as to divest himself immediately of all right, title and control therein; and (2) the delivery, actual or constructive, of the property to the donee.

51 N.C. App. 702, 704, 277 S.E.2d 462, 464 (1981).

Some of the factors noted in prior cases dealing with gifts of real estate or stock simply do not exist in a case dealing with life insurance. One obvious difference is that life insurance proceeds are not “delivered” to the donee until after the donor’s death; it is not a “gift *inter vivos*.”<sup>3</sup> In equitable distribution cases in particular, where one spouse claims property was a gift, the analysis normally focuses on whether consideration was paid for the asset. For example, in cases addressing deeds to real estate to one or both spouses from a third party, courts have noted “documents surrounding the transaction, whether a gift tax return was filed, and whether an excise tax was paid.” *Burnett*, 122 N.C. App. at 715, 471 S.E.2d at 651. All of the factors noted in *Burnett* address the issue of consideration for the transfer of real property. Excise taxes are based upon the purchase price for land. N.C. Gen. Stat. § 105-228.30 (2019); see *Patterson v. Wachovia Bank & Tr. Co., N.A.*, 68 N.C. App. 609, 612-13, 315 S.E.2d 781, 783 (1984) (“Under the provisions of G.S. 105-228.28, *et seq.*, every person who deeds real estate away for a consideration

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3. *Ownership* of a life insurance policy could be given or transferred during the insured’s life, but we are discussing payment of life insurance proceeds upon death of the insured.

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must pay the county an excise tax based on the consideration involved, but no tax is required of those who give property away. Yet, though the evidence shows that the property was worth over \$90,000, and the plaintiff Ross Coble, the only living person with personal knowledge as to the consideration involved, if there was any, is the one who had the deeds eventually recorded, no excise stamps were ever affixed to the deeds by the grantors.”). Gift tax returns are filed for gifts as defined by the applicable tax laws, but neither party here has made any argument based upon the treatment of the life insurance policy proceeds for tax purposes. In the cases addressing whether property is a gift, absence of consideration gives rise to an inference of donative intent, and thus a gift. *See Joyce v. Joyce*, 180 N.C. App. 647, 651, 637 S.E.2d 908, 911 (2006) (finding the transfer of property supported by adequate consideration from a father to son was not a gift). Payment of consideration gives rise to the opposite inference. *See id.*

Wife contends that Husband’s evidence regarding the lack of consideration and the circumstances of his prior marriage and the insurance policy on Mrs. Richter’s life was not sufficient to show Mrs. Richter’s “donative intent.” She argues Husband “failed to meet his burden of providing *any material evidence* that would establish or even hint at the origin, procuring circumstances and causes, or consideration (or lack thereof) for his status as Jeanne Richter’s life insurance beneficiary.” She claims, “Defendant’s own testimony as to the various components of the Life Insurance Proceeds was plainly silent on the purpose or intent of his status as a beneficiary, and largely in agreement with the Plaintiff’s in that it confirmed his receipt of the Life Insurance Proceeds during his marriage, and confirmed their existence as of the date of separation.” Wife is correct that Husband’s testimony at trial focused more on the tracing of the life insurance funds to the IRA, the Annuity Account, and the Fieldstone house, as part of his argument that these assets were his separate property because the life insurance proceeds themselves were his separate property. But Husband’s evidence was responding to Wife’s contentions regarding classification of the disputed assets.

At trial, Wife did not contend that Mrs. Richter made a gift of the life insurance proceeds to both of the parties or that there was any marital contribution to the life insurance policy. Wife’s arguments and evidence *at trial* addressed tracing of the funds and comingling of marital and separate funds. Her arguments at trial—until her closing argument—treated the life insurance proceeds as Husband’s separate property when received but she contended he had commingled the insurance proceeds with marital assets; Husband responded by showing evidence

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the proceeds were not commingled with marital assets, except as to the Fieldstone house.

Wife acknowledged at trial she had stipulated that the remaining funds in the Alliance account were Husband's separate property *because* the funds came from the life insurance proceeds but she did not stipulate to the classification of the other accounts because she did not know if any marital contributions were made to those accounts. Regarding the stipulation on Schedule H of the pretrial order, Wife testified the funds in the Alliance Account as of the date of separation were from the insurance proceeds:

Q: So you have stipulated that his Alliance account is his separate property?

A. That is the balance that is left as of the date of separation. He has used funds out of that account, and I believe there was money left over as of the date of separation. I'm not sure of the balance now. But yes, that part of it, that balance of the date of separation, is separate.

She then testified that she did not know whether marital funds had been contributed to the IRA and Annuity Account, although they were initially established with funds from the life insurance proceeds.

Both parties have presented a slightly different argument on appeal than they did before the trial court. This change is reflected in the parties' briefs, which devote a large part of their arguments to the stipulations instead of to the evidence. As we determined above, the stipulation regarding the Alliance Account did not entirely resolve the classification issues arising from the insurance proceeds, but the parties' equitable distribution affidavits and the pretrial order also present the classification issue as a tracing issue, not based upon the origin of the life insurance funds. Our Courts have long held that parties may not change horses on appeal to gain a better mount:

The issues before the trial court, however, were set out in a pretrial order to which plaintiff freely consented while represented by competent counsel, and plaintiff may not now take an inconsistent position on appeal. "The theory upon which a case is tried in the lower court must prevail in considering the appeal and interpreting the record and determining the validity of the exceptions." *Parrish v. Bryant*, 237 N.C. 256, 259, 74 S.E.2d 726, 728 (1953); *see also Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838



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(1934) (“the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court[ ]”), and *In re Peirce*, 53 N.C. App. 373, 382, 281 S.E.2d 198, 204 (1981) (where respondents stipulated to the use of “recording machines in lieu of a court reporter,” they waived on appeal any objection about the quality of the recording equipment used in the trial court).

*Inman v. Inman*, 136 N.C. App. 707, 714-15, 525 S.E.2d 820, 824-25 (2000) (alteration in original).

Neither party has entirely swapped horses on appeal, although both have at least changed the saddles on their horses. At trial, Wife’s testified she agreed the life insurance proceeds should be classified as Husband’s separate property but by the time of her closing argument, she attempted to avoid the stipulation and her own testimony. For the first time, she argued that none of the disputed assets should be classified as Husband’s separate property because he had failed to show “donative intent” by Mrs. Richter, going so far as to claim that the trial court was not “bound by the pretrial order” and requesting the trial court to classify all of the disputed assets as fully marital. She argued:

Now, what does that include? Well, it includes the Fieldstone property. It includes the [IRA]. It includes the annuity. It includes the Ford Escape. And even though, Judge, even though it’s listed on the Schedule, I think it was I,[4] the remainder of that Alliance account, I think, was listed there as a stipulation of separate property. I think that the evidence -- the Court isn’t bound by that Pretrial Order, if during the course of the proceedings, evidence is offered that contradicts the Pretrial Order.

As discussed above, Husband’s evidence did rely heavily on the stipulation that the Alliance Account was his separate property because it contained life insurance proceeds and all of the proceeds were initially in that account. Even though both parties have changed their theories or arguments on appeal to some extent, there was evidence from both Husband and Wife regarding the source of the life insurance proceeds

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4. It was Schedule H, and the trial court was bound by the pretrial order. “It is well-established that stipulations in a pretrial order are binding upon the parties and upon the trial court. *Clemons*, \_\_\_ N.C. App. at \_\_\_, 828 S.E.2d at 505. The trial court may not *ex mero motu* modify or eliminate stipulations after completion of the trial without giving the parties “any notice or opportunity to respond to the modification.” *Plomaritis v. Plomaritis*, 222 N.C. App. 94, 107, 730 S.E.2d 784, 793 (2012).



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and the circumstances under which he received them. Wife testified Husband and Mrs. Richter had previously shared 50-50 custody of their two sons but during her terminal illness, as her condition worsened, she became unable to care for the children, so they spent more time with Husband and Wife. Shortly before her death, Mrs. Richter agreed for Husband to have full custody of their sons and she was seeing them only on weekends and not overnight. On 27 August 2013, Mrs. Richter executed her Last Will and Testament in which she appointed Husband as her Executor. She left all her assets to her sons in trust and appointed Husband as her trustee and Wife as her alternate trustee. She also executed a Power of Attorney appointing Husband as her attorney-in-fact on 28 March 2014. Mrs. Richter's two sons were also the beneficiaries of her IRA accounts.

The trial court may draw reasonable inferences from the evidence, and based upon the circumstances of Mrs. Richter's death and Husband's position as sole custodian of their two children upon her death, the trial court's findings and conclusion that the life insurance proceeds should be classified as a gift to Husband are supported by the evidence.

When a trial by jury is waived, and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial judge.

In *Main Realty Co. v. Blackstone Valley Gas & E. Co.*, 59 R.I. 29, 193 A. 879, 112 A.L.R. 744, the court said: "In reaching his conclusions, the trial justice had the benefit of seeing and hearing the witnesses. He also was entitled to consider all the evidence and to draw therefrom such inferences as were reasonable and proper under the circumstances, even though another different inference, equally reasonable, might also be drawn therefrom."

*Elec. Motor & Repair Co. v. Morris & Assocs., Inc.*, 2 N.C. App. 72, 75, 162 S.E.2d 611, 613-14 (1968) (citation omitted).

Perhaps Wife could have argued at trial Mrs. Richter intended to benefit both her and Husband by the life insurance since at the time of her death, the parties were together and caring for her two sons. But she did not make this argument. Instead, she argues on appeal that Husband should have presented more specific or detailed testimony about Mrs. Richter's "donative intent" in making him the beneficiary of her life insurance policy. Yet as in most cases in which there is a dispute regarding whether an asset was a gift to one of the spouses, the trial

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court may look to the circumstances of the case and may infer the donative intent from a transfer made without consideration. *See Burnett*, 122 N.C. App. at 715, 471 S.E.2d at 651. Husband was the sole beneficiary of the life insurance policy, which supports the trial court's conclusion that the former Mrs. Richter did not intend to make a gift of the proceeds to the marriage or to Wife. As simply stated in *Burnett*, "a party claiming property acquired during the marriage to be separate, on the basis that it was a gift, has the burden of showing that the 'alleged donor intended to transfer ownership of the property without receiving any consideration in return.' " 122 N.C. App. at 714, 471 S.E.2d at 651 (quoting Brett R. Turner, *Equitable Distribution of Property* § 5.16 at 195 (2d ed. 1994)). Although this particular question was not the primary focus of the evidence presented by either party at trial, Husband's evidence supported the trial court's findings of fact and those findings support the trial court's conclusion of law as to classification of the disputed assets. In fact, Wife's evidence tended to support the trial court's findings and classification as well.

**III. Conclusion**

Because the trial court's findings are supported by the evidence and those findings support the trial court's conclusion of law classifying the disputed assets as Husband's separate property, we affirm the trial court's order.

**AFFIRMED.**

Judges ZACHARY and MURPHY concur.

**SIMMONS v. WILES**

[271 N.C. App. 665 (2020)]

TONY RAY SIMMONS, JR., PLAINTIFF

v.

JOHN LEE WILES, DEFENDANT

No. COA19-786

Filed 2 June 2020

**1. Torts, Other—battery—victim shot with gun—evidence of defendant’s intent to shoot**

In a civil battery case where defendant shot plaintiff during a parking lot incident, the trial court properly granted plaintiff’s motion for directed verdict on the issue of common law battery based on defendant’s own testimony that he purposely aimed his gun and fired at plaintiff in order to cause a non-lethal wound.

**2. Torts, Other—battery—self-defense—defense of another—genuine issue of material fact**

In a civil battery case where defendant shot plaintiff during a parking lot incident, there were sufficient inconsistencies in the evidence to raise a genuine issue of fact on the battery claim regarding whether defendant’s actions were justified as self-defense or defense of another to submit those issues to the jury.

**3. Torts, Other—battery—self-defense—defense of another—genuine issue of material fact**

In a civil battery case where defendant shot plaintiff during a parking lot incident, there was sufficient evidence to raise a genuine issue of fact regarding defendant’s claims of self-defense or defense of another to send the claims to the jury, including defendant’s acknowledged animosity toward plaintiff, defendant’s statement before shooting plaintiff that “I’ve got something for you . . .” and then his statement after the shooting “I wish I had killed you . . . . Die.”

**4. Damages and Remedies—punitive damages—civil battery—wilful and wanton or malicious—sufficiency of evidence to send to jury**

In a civil battery case where defendant shot plaintiff during a parking lot incident, there was sufficient evidence that defendant’s actions were wilful and wanton or malicious to submit the issue of punitive damages to the jury—therefore, the trial court did not err by denying defendant’s motions for directed verdict and for judgment notwithstanding the verdict.

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**5. Damages and Remedies—punitive damages—civil battery—jury instructions**

In a civil battery case where defendant shot plaintiff during a parking lot incident, the trial court did not abuse its discretion by submitting the issue of punitive damages to the jury and providing instructions on that issue where there was sufficient evidence that defendant's actions were willful and wanton or malicious.

**6. Civil Procedure—civil battery—motion for new trial—multiple grounds—abuse of discretion analysis**

The trial court did not abuse its discretion in denying defendant's motions for a new trial pursuant to Civil Procedure Rule 59(a)(1), (6), and (7). There were no irregularities that led to an unfair trial where some of defendant's arguments on appeal constituted invited error (e.g., although defendant claimed that the word "police" was used excessively during trial, he elicited testimony from police officers and his counsel used the word out of necessity, and defendant could not complain of a consolidated trial where he stipulated to no bifurcation of the punitive damages issue), and the jury's damages award was not excessive due to the influence of passion or prejudice where it was based on evidence of plaintiff's injuries and the impact of those injuries on his life.

Appeal by defendant from judgment and orders entered 22 April 2019 by Judge Beecher R. Gray in Cabarrus County Superior Court. Heard in the Court of Appeals 30 April 2020.

*Law Offices of L.T. Baker, P.A., by Lucas T. Baker, for plaintiff-appellee.*

*Arnold & Smith, PLLC, by Paul A. Tharp, for defendant-appellant.*

YOUNG, Judge.

This appeal arises out of a battery claim. The trial court did not err in granting Plaintiff's motion for directed verdict for the common law battery claim, or in denying Defendant's motion to dismiss, motion for directed verdict, or motion for judgment notwithstanding the verdict on the issues of self-defense or defense of others, or on the issue of punitive damages. The trial court also did not err in instructing the jury on punitive damages. Lastly, the trial court did not err in denying Defendant's motions for a new trial. Accordingly, we find no error, and uphold the decision of the lower court.

**SIMMONS v. WILES**

[271 N.C. App. 665 (2020)]

**I. Factual and Procedural History**

On 19 September 2009, Greta Clark (“Clark”) and her boyfriend, John Lee Wiles (“Defendant”) went to a local tool store searching for a lawn mower part. Clark waited in the car while Defendant went in the store. Defendant saw his neighbor, Tony Ray Simmons, Jr. (“Plaintiff”), inside of the store. Defendant claimed he did not know Plaintiff was in the store before entering, and Defendant had never spoken to Plaintiff before this encounter. However, Defendant believed that Plaintiff had made a complaint that prompted the county to order Defendant’s parents to remove junk cars from their land. Defendant accused Plaintiff “of being at the root of the county issue” and cursed at Plaintiff. Plaintiff cursed back at Defendant, and eventually Defendant left the store.

Store employee Michael Muller (“Muller”) testified at trial that Plaintiff entered the store at 3:30 p.m., and Defendant entered at 3:52 p.m. Muller did not think they were arguing, but another customer told Muller that “Those two guys are about to get into it.” Defendant left at 3:58 p.m., and Plaintiff left at 4:06 p.m. after purchasing a breaker bar.

When Defendant returned to his vehicle, he told Clark that he saw Plaintiff in the store. Clark wanted to see what Plaintiff looked like, so she asked Defendant to wait until Plaintiff came out of the store. Plaintiff came out, got in his truck and drove away. Moments later, Plaintiff’s truck reappeared near Defendant and Clark. Defendant testified that Plaintiff came at him and Clark very aggressively, with a weapon, while cursing, yelling and screaming, and that he was in fear of imminent bodily injury or death.

Defendant ran around the back of his car, screaming for Plaintiff to stop. Plaintiff charged forward, and Defendant fired one round at Plaintiff from his personal firearm. Plaintiff required emergency surgery to address the wound. Detective Todd Arthur (“Detective Arthur”) investigated the incident and said that the bar was steel, weighed between 10-15 pounds, and could cause “fatal injury or serious permanent disability if struck a person.”

Plaintiff filed a complaint on 13 April 2017 which alleged battery and sought compensatory and punitive damages. Defendant answered the complaint, denying its material allegations and contending that he shot Plaintiff in self-defense or defense of another. Plaintiff moved for a directed verdict on his battery claim, and on 21 December 2018, the trial court entered a directed verdict in Plaintiff’s favor. The issues of defenses and damages went to the jury. The jury returned a verdict rejecting Defendant’s defenses and awarding Plaintiff \$1,000,000.00 in compensatory damages and \$2,000,000.00 in punitive damages.

## SIMMONS v. WILES

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The trial court entered a judgment on 23 January 2019. On 4 February 2019, Defendant filed a motion for judgment notwithstanding the verdict and motion for new trial. The trial court denied Defendant's motions and entered a final judgment from which Defendant appealed on 20 May 2019.

II. Battery Claima. Standard of Review

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322, 411 S.E.2d 133, 138 (1991) (citing *Kelly v. Int'l Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971)).

In determining the sufficiency of the evidence to withstand a motion for a directed verdict, all of the evidence which supports the non-movant's claim must be taken as true and considered in the light most favorable to the non-movant, giving the non-movant the benefit of every reasonable inference which may legitimately be drawn therefrom and resolving contradictions, conflicts, and inconsistencies in the non-movant's favor.

*Turner v. Duke Univ.*, 325 N.C. 152, 158, 381 S.E.2d 706, 710 (1989).

b. Plaintiff's Directed Verdict

[1] Defendant contends that the trial court erred in granting Plaintiff's motion for directed verdict for the common law battery claim. We disagree.

The elements of the tort of common law battery are (1) the defendant intentionally caused bodily contact with the plaintiff; (2) the bodily contact caused physical pain or injury; and (3) the bodily contact occurred without the plaintiff's consent. *Andrews v. Peters*, 75 N.C. App. 252, 256, 330 S.E.2d 638, 640-41 (1985). Defendant contends that the intent element should have been presented to the jury but does not argue the other elements.

In *Andrews*, this Court held that when the nature of intent is at issue in common law intentional torts:

The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade

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the interests of another in a way that the law forbids. The defendant may be liable although intending nothing more than a good-natured practical joke, or honestly believing that the act would not injure the plaintiff, or even though seeking the plaintiff's own good.

*Id.* at 256, 330 S.E.2d at 640-41. Here, there is uncontroverted evidence from Defendant's own sworn testimony on direct examination that Defendant intended bodily contact to occur. When questioned by his own counsel, Defendant testified that he purposely aimed his firearm at the biggest part of Plaintiff's body that would cause a non-lethal wound. This testimony was an unequivocal admission that Defendant intended bodily contact with Plaintiff by shooting him. The issue is whether the contact was justified, not whether a battery occurred. Accordingly, taken in a light most favorable to the non-moving party, the trial court did not err in granting Plaintiff's motion for directed verdict on the issue of common law battery.

In a separate but related challenge, Defendant contends that the trial court violated his constitutional right to trial by jury when it granted Plaintiff's motion for directed verdict on his common law battery claim. N.C. Const. art. I, § 25. Because Defendant failed to preserve this argument for appeal, we decline to hear this argument.

c. Further Motions on Battery Claim

**[2]** Defendant contends that the trial court erred in denying Defendant's motion to dismiss, motion for directed verdict, and for judgment notwithstanding the verdict. We disagree.

Plaintiff's testimony, inconsistencies in Defendant's testimony, and Clark's impeachment each raise genuine issues of material fact as to whether Defendant acted in either self-defense, or in defense of another from a felonious assault. Therefore, it was appropriate for the defenses to go before the jury. The trial court did not err in denying Defendant's motion to dismiss, motion for directed verdict, or motion for judgment notwithstanding the verdict.

III. Self-Defense or Defense of Others

a. Standard of Review

"On appeal the standard of review for a JNOV is the same as that for a directed verdict, that is whether the evidence was sufficient to go to the jury." *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 498-99, 524 S.E.2d 591, 595 (2000).

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b. Analysis

[3] Defendant contends that the trial court erred when it denied Defendant's motion for directed verdict and motion for judgment notwithstanding the verdict on the issues of self-defense or defense of another. We disagree.

Reviewing Defendant's appeal from the trial court's denial of his motion for directed verdict, we must consider the evidence in the light most favorable to the non-moving party, Plaintiff. *Springs v. City of Charlotte*, 209 N.C. App. 271, 274-75, 704 S.E.2d 319, 322-23 (2011). This is the converse of our analysis regarding Plaintiff's motion for directed verdict, in which we considered the evidence in the light most favorable to Defendant.

Considering the evidence in the light most favorable to Plaintiff, it was sufficient to raise a genuine issue of material fact as to whether Defendant acted in self-defense or in defense of another. When interviewed by police shortly after the shooting, Defendant recounted the animosity he held toward Plaintiff, and Defendant asserted his perception that Plaintiff had cheated him and his family through the years. Richard Koch, counsel for Cabarrus County, testified via video deposition that Plaintiff was one of the neighbors who provided affidavits against Defendant's family for zoning violations.

We also must consider Plaintiff's testimony about the shooting, including the following: after Plaintiff exited the store, Defendant was waiting outside, confronted him, and said "I've got something for you . . ." Defendant then returned to the rear of his vehicle, pointed the gun at Plaintiff and pulled the trigger. Defendant then shot Plaintiff in the abdomen, stood over him, and said "I wish I had killed you . . . Die." Furthermore, we consider the videotaped deposition testimony of Blake Anthony Portis, Jr. ("Portis"), who worked in a gun store in Virginia, that on a date after the shooting Defendant sought to purchase a higher caliber gun than the .380 caliber pistol he used to shoot Plaintiff. Defendant commented to Portis, "I'm sure you're aware of what's going on in North Carolina, and that's the problem. When I shot [him], all I had was a .380. And if I'd have had [sic] a .45, I wouldn't be dealing with all the legal problems that I'm dealing with now."

Considering the evidence in the light most favorable to Plaintiff, it was sufficient evidence to go to the jury on the disputed issue of whether Defendant shot Plaintiff in self-defense or in the defense of another person, Clark. Accordingly, the trial court did not err in denying Defendant's motions for directed verdict and for judgment notwithstanding the verdict on the issues of self-defense or defense of another.



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IV. Punitive Damagesa. Standard of Review

As explained in Section III, a, above, our standard of review of a trial court's ruling on JNOV is the same as that for a directed verdict. Because we are reviewing Defendant's appeal from the denial of these motions, we must consider the evidence in the light most favorable to Plaintiff. On appeal from a judgment for punitive damages, the standard of review for both directed verdict and JNOV is "that a claimant must prove the existence of an aggravating factor by clear and convincing evidence." N.C. Gen. Stat. § 1D-15(b) (2007); *Scarborough v. Dillard's, Inc.*, 363 N.C. 715, 719, 693 S.E.2d 640, 643 (2009).

b. Analysis

[4] Defendant contends that the trial court erred when it denied Defendant's motion for directed verdict and motion for judgment notwithstanding the verdict on the issue of punitive damages. We disagree.

Incorporating the analysis from section IV above, the evidence was clear and convincing to support the jury's finding that Defendant's actions were willful and wanton or malicious. Taken in a light most favorable to Plaintiff, as the non-moving party, the evidence as to punitive damages, was sufficient as a matter of law to be submitted to the jury. Accordingly, as to the issue of punitive damages, the trial court did not err in denying Defendant's motion for directed verdict and motion for judgment notwithstanding the verdict.

V. Jury Instructions Regarding Punitive Damagesa. Standard of Review

"[T]he trial court has wide discretion in presenting the issues to the jury and no abuse of discretion will be found where the issues are 'sufficiently comprehensive to resolve all factual controversies and to enable the court to render judgment fully determining the cause.'" *Murrow v. Daniels*, 321 N.C. 494, 499-500, 364 S.E.2d 392, 396 (1988) (quoting *Chalmers v. Womack*, 269 N.C. 433, 435-36, 152 S.E.2d 505, 507 (1967)).

b. Analysis

[5] Defendant contends that the trial court erred in its instruction to the jury on punitive damages. We disagree.

Incorporating the analysis in sections IV and V above, the evidence was clear and convincing in nature that Defendant's actions were willful and wanton. We review the evidence in the light most favorable to

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Plaintiff, and viewed in that light, the evidence showed that Defendant acted with malice and willfully and wantonly. Therefore, the trial court did not abuse its discretion in submitting the issue of punitive damages to the jury or instructing the jury on punitive damages.

VI. New Triala. Standard of Review

“[A]n appellate court’s review of a trial judge’s discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.” *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). “Where errors of law were committed . . . , the trial court is required to grant a new trial.” *Eason v. Barber*, 89 N.C. App. 294, 297, 365 S.E.2d 672, 674 (1988).

b. Analysis

[6] Defendant contends that the trial court erred and abused its discretion in denying Defendant’s motions for a new trial in violation of N.C. R. Civ. P. 59(a)(1), (6), and (7). We disagree.

Defendant’s first claim of irregularity is that the focus of the trial was on Defendant’s criminal investigation, precluding evidence of the investigation’s result. But at the outset of trial, defense counsel stipulated that no reference would be made before the jury that Defendant “was never charged with a crime or prosecuted for the events at issue in this litigation.” Defendant now argues that excluding this evidence prejudiced him. Defendant also contends that he was prejudiced because multiple officers testified, and the word “police” was used excessively at trial. This is invited error, and thus we reject this argument. The focus of the trial was on the events of 19 September 2009 and the impact that those events had on Plaintiff’s life. Both sides elicited testimony from police officers, and counsel for both parties used the word “police” on multiple occasions out of necessity. There was nothing irregular about the focus of the trial and the use of the word “police.”

Defendant’s second claim of irregularity is that the trial court erred in denying his motion for directed verdict on the issue of battery. We have already addressed this issue in this opinion. The trial court did not err, and the denial of the motion for directed verdict was not an irregularity.

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Defendant's third claim of irregularity is that non-bifurcation of the issues prejudiced him. The parties stipulated in the Consent Order on Final Pre-Trial Conference that:

[I]n an effort to expedite the trial, there will be no bifurcation or severance of the issues to be tried in this case. Defendant is aware of his right to request a separate trial on the issue of punitive damages under Chapter 1D of the North Carolina General Statutes and expressly waives that right.

This too is invited error.

Defendant contends that the trial court abused its discretion in declining to grant Defendant's motion for new trial, on the ground that excessive damages were awarded under the influence of passion and prejudice. There was ample testimony from Plaintiff, four treating physicians, and Plaintiff's family regarding the nature and extent of Plaintiff's injuries, and how the pain and suffering impacted Plaintiff's life. The trial court reviewed this evidence, and in its sound discretion, decided that the evidence supported the damages awarded by the jury and was not made under any improper influence. Therefore, the trial court did not err.

Lastly, Defendant contends that the directed verdict in Plaintiff's favor on the battery claim was against the greater weight of the evidence. This is essentially a compilation of all Defendant's arguments. The record shows that the trial court carefully considered the evidence and properly denied the request for a new trial.

**NO ERROR.**

Judges INMAN and ZACHARY concur.

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SOUND RIVERS, INC. AND NORTH CAROLINA COASTAL  
FEDERATION, INC., PETITIONERS

v.

N.C. DEPARTMENT OF ENVIRONMENTAL QUALITY, DIVISION OF  
WATER RESOURCES, RESPONDENT, MARTIN MARIETTA  
MATERIALS, INC., RESPONDENT-INTERVENOR

No. COA18-712

Filed 2 June 2020

**1. Administrative Law—contested case—petition for judicial review—jurisdiction in superior court—timely filing—untimely service**

Where two environmental nonprofits (petitioners) petitioned for judicial review in the superior court of their contested case, in which an administrative law judge affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier, the superior court properly denied the supplier's motion to dismiss the petition for judicial review for lack of subject matter jurisdiction. Although petitioners did not timely serve notice of their petition to the supplier within 10 days, as required under N.C.G.S. § 150B-46, petitioners timely filed the petition itself, and therefore the superior court had jurisdiction to extend the time for service and subsequently hear the case.

**2. Administrative Law—judicial review of contested case—persons aggrieved—substantial prejudice**

After an administrative law judge (ALJ) affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier allowing it to discharge mine wastewater into tributaries in Blounts Creek, the superior court properly concluded that two environmental nonprofits (petitioners) met their burden under the Administrative Procedure Act of proving that DEQ substantially prejudiced their rights in issuing the permit, making them "persons aggrieved" entitled to judicial review of the ALJ's order. With support from multiple affidavits, petitioners alleged that DEQ violated its own regulations by issuing the permit and that the discharge of wastewater into Blounts Creek would adversely affect the water quality, native wildlife, and recreational and commercial activities in the area.

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**3. Administrative Law—judicial review of contested case—water pollutant permit—biological integrity standard**

After an administrative law judge (ALJ) affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier allowing it to discharge mine wastewater into tributaries in Blounts Creek, the superior court improperly reversed the ALJ's decision on grounds that DEQ failed to ensure the permit reasonably complied with the "biological integrity standard" for surface waters under the N.C. Administrative Code. Not only did the whole record support the ALJ's findings of fact, which showed DEQ conducted thorough evaluations to ensure compliance with the biological integrity standard, but also the superior court improperly substituted its own findings of fact (based on witness testimony taken out of context) and misinterpreted the standard rather than deferring to DEQ's interpretation of it.

**4. Environmental Law—judicial review of contested case—water pollutant permit—compliance with quality standards for swamp waters**

After an administrative law judge (ALJ) affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier allowing it to discharge mine wastewater into tributaries in Blounts Creek, the superior court (reversing the order on other grounds) properly concluded the permit reasonably complied with water quality standards for Class "C" bodies of water with a "swamp waters" supplemental classification. A preponderance of the evidence demonstrated that DEQ reasonably interpreted and applied the rules governing swamp waters and the state's antidegradation policy, and petitioners (two environmental nonprofits) failed to show that the rules imposed an additional duty to preserve swamp waters in their existing conditions.

**5. Environmental Law—judicial review of contested case—water pollutant permit—compliance with pH water quality standards**

After an administrative law judge (ALJ) affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier allowing it to discharge mine wastewater into tributaries in Blounts Creek, the superior court (reversing on other grounds) correctly concluded that the permit did not violate pH water quality standards for Class "C" bodies of water with a "swamp waters"

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supplemental classification. DEQ's longstanding interpretation of the applicable pH standards was reasonable, and the permit required the combined pH of the Blounts Creek waters and the discharged wastewater to remain within a range consistent with this interpretation.

**6. Environmental Law—judicial review of contested case—water pollutant permit—reopener provision**

After an administrative law judge (ALJ) affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier allowing it to discharge mine wastewater into tributaries in Blounts Creek, the superior court (reversing on other grounds) correctly concluded that DEQ had authority under its “reopener provision” to reopen, modify, or revoke the permit if any unexpected water quality standard violations occurred after the permit was issued. Moreover, the reopener provision did not enable DEQ to issue a permit expected to violate water quality standards.

Judge BROOK concurring in part and concurring in the result in part with separate opinion.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by respondent North Carolina Department of Environmental Quality, Division of Water Resources, respondent-intervenor Martin Marietta Materials, Inc., and cross-appeal by petitioners Sound Rivers, Inc. and North Carolina Coastal Federation, Inc., from orders entered 13 November 2015 by Judge W. Douglas Parsons in Superior Court, Beaufort County, 30 October 2017, 4 December 2017, and 20 December 2017 by Judge Joshua W. Willey, Jr in Superior Court, Carteret County. Heard in the Court of Appeals 22 May 2019.

*Southern Environmental Law Center, by Geoffrey R. Gisler, Blakely E. Hildebrand, and Jean Zhuang, for petitioner-appellees.*

*Attorney General Joshua H. Stein, by Assistant Attorney General Asher P. Spiller and Assistant Attorney General Scott A. Conklin, for respondent-appellant.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Matthew B. Tynan, George W. House, Alexander Elkan and V. Randall Tinsley, for respondent-intervenor-appellant.*

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STROUD, Judge.

This case arises from the issuance of a National Pollutant Discharge Elimination System Permit (“Permit”) by respondent North Carolina Department of Environmental Quality, Division of Water Resources (“DEQ”) to respondent-intervenor Martin Marietta Materials, Inc., (“Martin Marietta”) allowing respondent Martin Marietta to discharge wastewater from Vanceboro Quarry (“quarry”) into “unnamed tributaries to Blounts Creek[.]” The Administrative Law Judge (“ALJ”) of the Office of Administrative Hearings (“OAH”) entered a final decision affirming the issuance of the Permit. Petitioners Sound Rivers, Inc. and North Carolina Coastal Federation, Inc. (“Petitioners”) filed a petition for judicial review with the superior court.<sup>1</sup> The superior court reversed the ALJ’s final decision based upon a failure to “ensure reasonable compliance with the biological integrity standard” (“biological integrity standard”) found in the North Carolina Administrative Code (“Code”) but concluded that the Permit was in compliance with other water quality standards, including “swamp waters supplemental classification and the state antidegradation rule” (“swamp waters”) and pH (“pH standards”).

Respondent Martin Marietta and respondent DEQ appeal from the superior court’s order reversing the ALJ’s order due to its conclusion on biological integrity standards. Petitioners cross-appeal from the superior court’s order based upon its conclusion that the Permit reasonably ensured compliance with water quality standards regarding swamp waters and pH standards. We note at the outset that at all stages of the proceedings, the parties have filed numerous documents, including briefs, motions, proposed drafts of orders, responses, and exhibits; in this opinion we will mention only those documents relevant to the issue on appeal as the documents are so voluminous, but we have reviewed all of the documents before us and after review of the briefs, record, and transcripts, we affirm the superior court’s order as to swamp waters and pH standards and reverse as to the biological integrity standard.

### I. Factual and Procedural Background

In September of 2013, Sound Rivers and North Carolina Coastal Federation filed a petition for a contested case hearing on DEQ’s issuance of the Permit on 24 July 2013 to Martin Marietta. According to the

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1. Petitioner Sound Rivers, Inc. was known as the Pamlico-Tar River Foundation when the original petition for a contested case hearing was filed; it noted its name had changed to Sound Rivers, Inc. effective 1 April 2015 in its 20 April 2015 petition for judicial review. For simplicity, we will refer to the petitioner throughout this opinion as Sound Rivers.

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petition, the Permit authorized Martin Marietta to “the discharge of 12 million gallons of mine wastewater into tributaries of Blounts Creek each day.” Petitioners alleged the Permit violated “applicable laws” attached and incorporated into the petition.

The Permit was issued under the provisions of North Carolina General Statute § 143-215.1 and “other lawful standards and regulations promulgated and adopted by the North Carolina Environmental Management Commission, and the Federal Water Pollution Control Act, as amended[.]” The Permit was effective on 1 September 2013 and would expire on 31 August 2018.<sup>2</sup> The Permit allowed Martin Marietta to discharge water pumped from its quarry “from two pit clarification ponds” identified on an attached map into “receiving waters designated as unnamed tributaries to Blounts Creek in the Tar-Pamlico River Basin in accordance with effluent limitations, monitoring requirements, and other conditions set forth in Parts I, II, and III” of the Permit. The supplement to the Permit cover sheet noted that the “unnamed tributary” into which the wastewater would be discharged was “classified as C-Swamp NSW waters in the Tar-Pamlico River Basin.” In this opinion, we will refer to the waters into which wastewater from the quarry would be discharged as “Blounts Creek.”

In September of 2013, respondent DEQ submitted a prehearing statement identifying the issues to be resolved as

[(1)] whether Respondent, properly issued the Permit pursuant to Article 21, Chapter 143 of the North Carolina General Statutes and the applicable rules promulgated thereunder, including but not limited to 15A NCAC 2B.0200 *et. seq.*; and [(2)] whether Respondent, in issuing

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2. No party has argued this case may be moot based upon the fact that the Permit as issued would have expired in 2018. “A case is ‘moot’ when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. Thus, the case at bar is moot if an intervening event had the effect of leaving plaintiff with no available remedy. A moot claim is not justiciable, and a trial court does not have subject matter jurisdiction over a non-justiciable claim. Moreover, if the issues before the court become moot at any time during the course of the proceedings, the usual response is to dismiss the action for lack of subject matter jurisdiction.” *Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep’t of Health & Human Servs.*, 242 N.C. App. 524, 528-29, 776 S.E.2d 329, 333 (2015) (citations, quotation marks, brackets omitted). But an exception to the mootness doctrine applies to this case because it is “capable of repetition, yet evading review[.]” *Id.* at 529, 776 S.E.2d at 333-34 (“Two elements are required for the capable of repetition, yet evading review exception to apply: (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party would be subjected to the same action again.” (citations, quotation marks, and brackets omitted)).



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the Permit substantially prejudiced Petitioner's rights and erred in one or more of the five ways enumerated in N.C. Gen. Stat. § 150B-23(a).

Martin Marietta, who had intervened, also submitted a prehearing statement contending the Permit "would not violate water quality standards" and noted that the Permit had been issued "after years of pre-permitting work, the submission of engineering, economic, and ecological studies and materials by Martin Marietta, and extensive review and analysis by DWR [Division of Water Resources,] and other state and federal government agencies." Martin Marietta contended state and federal regulatory personnel had thoroughly analyzed the proposed permit over about eighteen months, including "site visits, field work, numerous communications and meetings, the further submission of materials and studies by Martin Marietta, and public comment and a public hearing, in which Petitioners and their members and counsel participated." Thus, Martin Marietta contended state and federal regulatory personnel had already considered the "claims asserted by Petitioners in this contested case" and DEQ "correctly concluded that the proposed discharge allowed by the NPDES Permit would not violate water quality standards and lawfully and appropriately issued the NPDES Permit."

On 6 November 2013, Petitioners filed their prehearing statement contending that the Permit did not comply with biological integrity standards, protection of swamp waters, and pH standards, and identifying the issues as:

1. The Clean Water Act and state laws implementing it prohibit discharges that violate any water quality standard. State water quality standards for waters like Blounts Creek prohibit any discharge that will make a waterbody unsuitable for native plants and animals, violating its "biological integrity." Martin Marietta's proposed discharge of 12 million gallons of mine wastewater per day into Blounts Creek would displace native fish, macroinvertebrates (insects, mollusks, crayfish, etc.) and plants. Did DWR exceed its authority, act erroneously, fail to use proper procedure, act arbitrarily or capriciously or fail to act as required by rule or law "err") by authorizing the discharge?
2. The Clean Water Act and state laws implementing it prohibit discharges that violate any water quality standard. The state water quality standard for pH is the

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normal pH for the waterbody receiving a discharge, which is between 4.0 and 5.5 in Blounts Creek. Did DWR err by authorizing a discharge that would raise the pH in the creek to a minimum of 6.3 to 6.9?

3. The Clean Water Act and state laws implementing it require classification of waters to protect existing uses. North Carolina has classified Blounts Creek as swamp waters to protect characteristics unique to these waters, including low flow and velocity, low pH, and high tannin levels. Did DWR err by issuing a permit for a discharge that will cause Blounts Creek to have higher flow and velocity, near neutral pH, and low tannin levels, thereby no longer qualifying as swamp waters?

In November of 2014 Petitioners filed a motion for summary judgment on the issues of whether Petitioners were “persons aggrieved” under North Carolina’s Administrative Procedure Act and whether DWR had exceeded its authority or failed to act as required by law based upon failure to ensure compliance with the biological integrity water quality standard, the pH water quality standard, and Blounts Creek’s swamp waters classification. Petitioners also submitted numerous affidavits to support their motion. On 25 November 2014, Martin Marietta filed a motion for summary judgment.

On 23 March 2015, the ALJ entered an order granting summary judgment for respondents. The order stated at length the undisputed facts and concluded “Petitioners are not ‘Persons Aggrieved[;]’ ” “Respondent’s Decision to Issue the Permit was Not in Violation of N.C. Gen. Stat. § 150B-23(a)[;]” “Respondent Ensured Compliance with Biological Integrity Standard[;]” “Respondent Ensured Compliance with pH Water Quality Standards[;]” and “Respondent Protected Existing Uses[.]” The ALJ also noted the “Re-opener Provision” of the Permit:

The permit issued to the Respondent-Intervenor allows the Respondent to re-open and modify the permit if water quality standards are threatened or other monitored data cause concern. Even if Petitioner provided evidence of specific and particularized potential violations of water quality standards, the re-opener provision assures reasonable compliance with those standards.

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In summary, the ALJ concluded,

There is no evidence that Petitioners' rights have been substantially prejudiced, or that Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule.

For the reasons discussed herein, there is no genuine issue as to any material fact. Respondent's Motion for Summary Judgment is allowed; Respondent-Intervenor's Motion for Summary Judgment is allowed. Petitioners' Motion for Summary Judgment is denied, and Petitioners are not entitled to the relief requested in the petition.

On 20 April 2015, Petitioners filed a petition for judicial review of the summary judgment order contesting the ALJ's determinations. On 20 May 2015, Martin Marietta responded to and filed a motion to dismiss petitioners' petition for judicial review, arguing the superior court did not have subject matter jurisdiction because petitioners are not "persons aggrieved" and therefore not entitled to judicial review. On 13 November 2015, the superior court entered its order denying Martin Marietta's motion to dismiss and denying petitioner's petition on all grounds except for the issue of "persons aggrieved." The superior court concluded petitioners were persons aggrieved and remanded the matter back to OAH for a "full plenary hearing[.]"

After a "hearing on the merits May 31, 2016 through June 9, 2016[.]" on 30 November 2016, the ALJ issued a 62-page final decision. The final decision addressed four primary issues:

**Issue 1: "pH Claim":** Whether Petitioners have met their burden of proving that Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining the NPDES Permit reasonably ensures compliance with the pH water quality standard.

**Issue 2: "Swamp Waters Claim":** Whether Petitioners have met their burden of proving that Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining the NPDES Permit reasonably ensures compliance

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with water quality standards and regulations related to the “Swamp Waters” supplemental classification.

**Issue 3: “Biological Integrity Claim”:** Whether Petitioners have met their burden proving that Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining the NPDES Permit reasonably ensures compliance with the biological integrity water quality standard.

**Issue 4: Substantial Prejudice:** Whether Petitioners have met have their burden of proving that Respondent substantially prejudiced Petitioners’ rights in issuing the NPDES Permit.

The ALJ made 311 findings of fact; we will address some of these findings of fact below in detail in our discussion of the challenged findings applicable to each issue. The order ultimately denied Petitioners’ claims based upon two alternative and independent grounds: First, “Petitioners failed to meet their burden of proving by a preponderance of evidence that Respondent DWR exceeded its authority or jurisdiction, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule in issuing the NPDES Permit.” Second, as an independent and alternative basis for the ruling, “Petitioners failed to carry their burden of proof by a preponderance of the evidence that their rights have been substantially prejudiced by Respondent DWR’s issuance of the NPDES Permit.”

In December of 2016, Petitioners filed a petition in superior court for judicial review of the ALJ’s final decision. Petitioners alleged the order was in error in that “The Final Decision Contains Findings of Fact Unsupported by Substantial Evidence, Findings That Are Arbitrary, Capricious, or an Abuse Of Discretion, and Findings Affected By Other Errors Of Law[;]” “The ALJ’s Conclusion That Petitioners Are Not Substantially Prejudiced Is Erroneous[;]” “The ALJ’s Grant of Deference to DWR Staff And [Martin Marietta] Consultants Is An Error Of Law[;]” “The ALJ’s Conclusion That DWR Complied with the Biological Integrity Standard Is Erroneous[;]” “The ALJ’s Conclusion That DWR Complied with the pH Standard Is Erroneous[;]” “The ALJ’s Conclusions of Law Regarding the Swamp Waters Classification And Antidegradation Rules Are Erroneous[;]” and “The ALJ’s Conclusion That the Required Reopener Provision Ensures Compliance With Water Quality Standards Is Erroneous[.]”

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On 30 January 2017, Martin Marietta filed a motion to dismiss the petition under North Carolina General Statute § 150B-46 and North Carolina Rule of Civil Procedure 12 because the petition for judicial review was not timely served. On 30 October 2017, the superior court denied Martin Marietta's motion to dismiss. On 4 December 2017, the superior court denied Martin Marietta's motion to dismiss for failure to state a claim under North Carolina Rule of Civil Procedure 12(b)(6).

On 20 December 2017, the superior court entered its order on petition for judicial review. The superior court noted these issues:

- I. Did the ALJ err in admitting, considering, or determining the credibility or weight of evidence?
- II. Did the ALJ err in upholding DWR's issuance of the Permit as reasonably ensuring compliance with:
  - A. The swamp waters supplemental classification and antidegradation rule;
  - B. The water quality standard for pH; and
  - C. The water quality standard for biological integrity?
- III. Did the ALJ err in holding that the Permit's monitoring and reopener provisions further reasonably ensure compliance with state water quality standards?
- IV. Did the ALJ err in holding that Petitioners failed to prove their rights were substantially prejudiced?

The superior court entered its order in paragraph form with no numbered findings of fact and with two conclusions of law. Ultimately, the superior court concluded Petitioners were "substantially prejudiced by the issuance of the Permit and are entitled to the relief sought." On the substantive issues regarding water quality standards, the superior court concluded that DEQ "did not ensure reasonable compliance with the biological integrity standard as set forth in 15A N.C.A.C. 02B .211(2), 0220(2), and 0202(11)" and therefore reversed the final decision of the ALJ and vacated the Permit.

Over the course of 10 days, all parties filed written notices of appeal and cross-appeal, seeking review of the following orders:

1. 13 November 2015 order granting summary judgment to Petitioners regarding being "persons aggrieved" and denying all other matters;
2. 27 February 2017 ruling from the superior court denying Martin Marietta's motion to dismiss and granting Petitioners' motion for extension of time;

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3. 30 October 2017 order memorializing 27 February 2017 ruling that denied Martin Marietta's motion to dismiss and granted Petitioners' motion for extension of time;
4. 4 December 2017 order denying Martin Marietta's motion to dismiss, and
5. 20 December 2017 superior court order on the petition for judicial review vacating the Permit.

**II. Preliminary Issues**

We begin our analysis by addressing preliminary issues.

**A. Martin Marietta's Motion to Dismiss**

**[1]** On 30 January 2017, Martin Marietta filed a motion to dismiss the petition for judicial review under North Carolina General Statute § 150B-46 and North Carolina Rule of Civil Procedure 12 because it was not timely served on Martin Marietta. On 30 October 2017, the superior court denied Martin Marietta's motion to dismiss. North Carolina General Statute § 150B-46 (2017) provides, "Within 10 days after the petition is filed with the court, the party seeking the review shall serve copies of the petition by personal service or by certified mail upon all who were parties of record to the administrative proceedings." According to the motion, the petition was filed on 28 December 2016, but Martin Marietta was not actually served until 17 January 2017. On 30 October 2017, the superior court denied Martin Marietta's motion to dismiss and extended the time for service.

Martin Marietta relies upon *In re State ex rel. Employment Security Commission*, 234 N.C. 651, 68 S.E.2d 311 (1951), arguing Petitioner's appeal must be dismissed due to late service of the notice:

There is no inherent or inalienable right of appeal from an inferior court to a Superior Court or from a Superior Court to the Supreme Court.

*A fortiori*, no appeal lies from an order or decision of an administrative agency of the State or from the judgments of special statutory tribunals whose proceedings are not according to the course of the common law, unless the right is granted by statute. If the right exists, it is brought into being, and is a right granted, by legislative enactment.

There can be no appeal from the decision of an administrative agency except pursuant to specific statutory provision therefor.

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Obviously then, the appeal must conform to the statute granting the right and regulating the procedure.

The statutory requirements are mandatory and not directory. They are conditions precedent to obtaining a review by the courts and must be observed. Noncompliance therewith requires dismissal.

....

This statement of the grounds of the appeal must be *filed* within the time allowed for appeal. Its purpose is to give notice to the Commission and adverse parties of the alleged errors committed by the Commission and limit the scope of the hearing in the Superior Court to the specific questions of law raised by the errors assigned. Clearly it was intended, and must be construed, as a condition precedent to the right of appeal. Noncompliance therewith is fatal.

*Id.* at 653-54, 68 S.E.2d at 312 (emphasis added). Although the petition for judicial review was timely *filed*, Martin Marietta contends because Petitioners failed to serve the notice of appeal upon Martin Marietta within 10 days under North Carolina General Statute § 150B-46, the superior court never obtained subject matter jurisdiction. The superior court thus had no jurisdiction to extend the time for service, so Martin Marietta's motion to dismiss should have been allowed for lack of subject matter jurisdiction.

We review a motion to dismiss for lack of subject matter jurisdiction *de novo*. *See Hardy ex rel. Hardy v. Beaufort Cty. Bd. of Educ.*, 200 N.C. App. 403, 408, 683 S.E.2d 774, 778 (2009) ("Subject matter jurisdiction is a prerequisite for the exercise of judicial authority over any case or controversy. The standard of review on a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction is *de novo*. (citation omitted)). While the file stamp is not legible on the petition for judicial review, Martin Marietta concedes that the petition was filed with the superior court on 28 December 2016, and thus within the time period established by North Carolina General Statute § 150B-45 to invoke jurisdiction from the final decision entered on 30 November 2016. *See* N.C. Gen. Stat. § 150B-45 (2017)<sup>3</sup> ("To obtain judicial review of a final decision under this Article, the person seeking review must file a petition within 30 days after the person is served with a written copy of the decision."). In *NC*

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3. North Carolina General Statute § 150B-45 was amended in 2018; the amendment does not affect this case. *See* N.C. Gen. Stat. § 150B-45 (2018).



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*Department of Public Safety v. Owens*, this Court held “that the superior court has the authority to grant an extension in time, for good cause shown, to a party to serve the petition beyond the ten days provided for under G.S. 150B-46.” 245 N.C. App. 230, 234, 782 S.E.2d 337, 340 (2016). Under *Owens*, the superior court had subject matter jurisdiction and properly extended the time for service and thus denied the motion to dismiss. *See id.* Because Martin Marietta raises only the issue of subject matter jurisdiction in its brief, and not the substance of the good cause shown, we end our analysis here. This argument is overruled.

**B. Standing of Petitioners as “Persons Aggrieved”**

**[2]** Martin Marietta next contends that the superior court erred in determining that petitioners were substantially prejudiced by DEQ’s issuance of the Permit.

At the outset, we must determine our standard of review. That standard of review will depend upon the nature of the error alleged in the petition for judicial review. If errors of law are alleged, our review is de novo. If the alleged error is that the final agency decision is not supported by the evidence, we employ the whole record test.

*Curtis v. N.C. Dep’t of Transp.*, 140 N.C. App. 475, 478, 537 S.E.2d 498, 501 (2000) (citations and quotation marks omitted).

North Carolina General Statute § 150B-23 provides,

(a) A contested case shall be commenced by paying a fee in an amount established in G.S. 150B-23.2 and by filing a petition with the Office of Administrative Hearings and, except as provided in Article 3A of this Chapter, shall be conducted by that Office. The party who files the petition shall serve a copy of the petition on all other parties and, if the dispute concerns a license, the person who holds the license. A party who files a petition shall file a certificate of service together with the petition. A petition shall be signed by a party, an attorney representing a party, or other representative of the party as may specifically be authorized by law, and, if filed by a party other than an agency, *shall state facts tending to establish that the agency named as the respondent has deprived the petitioner of property, has ordered the petitioner to pay a fine or civil penalty, or has otherwise substantially prejudiced the petitioner’s rights* and that the agency:



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- (1) Exceeded its authority or jurisdiction;
- (2) Acted erroneously;
- (3) Failed to use proper procedure;
- (4) Acted arbitrarily or capriciously; or
- (5) Failed to act as required by law or rule.

The parties in a contested case shall be given an opportunity for a hearing without undue delay. Any person aggrieved may commence a contested case hereunder.

N.C. Gen. Stat. § 150B-23(a) (2013) (emphasis added).<sup>4</sup> Petitioners have not alleged they were deprived of property or were ordered to pay a fine or civil penalty, and thus they must show substantial prejudice. *See id.* North Carolina General Statute § 150B-29 provides, “The party with the burden of proof in a contested case must establish the facts required by G.S. 150B-23(a) by a preponderance of the evidence.” N.C. Gen. Stat. § 150B-29 (2013). Thus, in this case, petitioners had to establish substantial prejudice by a preponderance of the evidence. *See* N.C. Gen. Stat. §§ 150B-23, -29.

In *Empire Power Co. v. North Carolina Department of Environmental Health and Natural Resources*, our Supreme Court discussed the meaning of the term “person aggrieved” in a case with a similar context, arising from issuance of a draft air quality permit for a proposed turbine electric generating station. 337 N.C. 569, 572, 447 S.E.2d 768, 770 (1994). As explained in *Empire Power Co.*,

Under the NCAPA, any “person aggrieved” within the meaning of the organic statute is entitled to an administrative hearing to determine the person’s rights, duties, or privileges. N.C.G.S. § 150B-23(a). “ ‘Person aggrieved’ means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment, by an administrative decision.” N.C.G.S. § 150B-2(6). Under the predecessor judicial review statute, which did not define the term, the Court gave it an expansive interpretation:

The expression “person aggrieved” has no technical meaning. What it means depends on the circumstances involved. It has been variously defined: “Adversely or injuriously affected;

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4. Subsection(f) was amended in 2018. *See* N.C. Gen. Stat. § 150B-23 (2018).

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damnified, having a grievance, having suffered a loss or injury, or injured; also having cause for complaint. More specifically the word(s) may be employed meaning adversely affected in respect of legal rights, or suffering from an infringement or denial of legal rights.”

*In re Assessment of Sales Tax*, 259 N.C. at 595, 131 S.E.2d at 446 (quoting 3 C.J.S. *Aggrieved*, at 509 (1973)). For the following reasons, we conclude that Clark is a “person aggrieved” as defined by the NCAPA within the meaning of the organic statute.

Clark alleged that DEHNR issued the permit allowing construction and operation of air emission sources at the LCTS in violation of its statutory and regulatory duties: to act on all permit applications “so as to effectuate the [legislative] purpose . . . by reducing existing air pollution and preventing, so far as reasonably possible, any increased pollution of the air from any additional or enlarged sources,” N.C.G.S. § 143–215.108(b); to reduce levels of ozone pollution in the Mecklenburg County area; to assess fully the impact of emissions of air pollutants from the LCTS on levels of ozone pollution in Mecklenburg County; to assess fully the impact of sulfur dioxide emissions from the LCTS; to require air pollution control technology adequate to control the emission of potentially harmful pollutants from the LCTS; and to require Duke Power to cause air quality offsets. Clark also alleged that DEHNR issued the permit in violation of its statutory duty to adequately address comments filed by Clark and other members of the public during the public comment period.

Clark further alleged that, as the owner of property immediately adjacent to and downwind of the site of the proposed LCTS—which will emit tons of harmful air pollutants if constructed and operated in accordance with its air quality permit—he and his family will suffer injury to their health, the value of their property, and the quality of life in their home and their community.

In enacting the air pollution control provisions, the General Assembly, as noted above, declared its intent to achieve and to maintain for the citizens of the State a total environment of superior quality.

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Recognizing that the water and air resources of the State belong to the people, the General Assembly affirm[ed] the State's ultimate responsibility for the preservation and development of these resources in the best interest of all its citizens and declare[d] the prudent utilization of these resources to be essential to the general welfare.

N.C.G.S. § 143-211. To further that intent, the General Assembly mandated that standards of water and air purity be designed, and programs implemented to achieve those standards,

*to protect human health, to prevent injury to plant and animal life, to prevent damage to public and private property, to insure the continued enjoyment of the natural attractions of the State, to encourage the expansion of employment opportunities, to provide a permanent foundation for healthy industrial development and to secure for the people of North Carolina, now and in the future, the beneficial uses of these great natural resources.*

*Id.* (emphasis added).

*Clearly, Clark alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the statute, and rules and standards promulgated pursuant thereto, the substantive and procedural requirements of which he asserts the agency violated when it issued the permit.* As an adjacent property owner downwind of the LCTS, Clark may be expected to suffer from whatever adverse environmental consequences the LCTS might have. In addition, a judgment in favor of Clark would substantially eliminate or redress the injury likely to be caused by the decision to permit Duke Power to build the LCTS. Clark therefore is a "person aggrieved" within the meaning and intent of the air pollution control act. *See Orange County v. Dept. of Transportation*, 46 N.C. App. 350, 360–62, 265 S.E.2d 890, 898–99, *disc. rev. denied*, 301 N.C. 94 (1980) (plaintiffs were all "aggrieved," within the meaning of the NCAPA provision, by a decision of the State Board of Transportation on the location of an interstate highway where the individual plaintiffs were property owners within

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the proposed corridor of the highway, the members of plaintiff non-profit corporation were citizens and taxpayers who lived in or near the proposed highway corridor, plaintiff county's tax base and planning jurisdiction would be affected, and individual plaintiffs would be affected as taxpayers; further, the "procedural injury" implicit in the failure of an agency to prepare an environmental impact statement was itself a sufficient "injury in fact" to support standing as an "aggrieved party" under former N.C.G.S. § 150A-43, as long as such injury was alleged by a plaintiff having sufficient geographical nexus to the site of the challenged project that he might be expected to suffer whatever environmental consequences the project might have); *State of Tennessee v. Environmental Management Comm.*, 78 N.C. App. 763, 766-67, 338 S.E.2d 781, 783 (1986) (a consent special order issued by respondent agency to a corporation allowing it to discharge effluents into a river was issued without a hearing and by its own terms purported to take precedence over the terms of a proposed National Pollutant Discharge Elimination System permit to the corporation, so that the right of petitioner to be heard was impaired; petitioner therefore qualified as an "aggrieved person" for purposes of judicial review; further, petitioner alleged that its property rights in the river were affected, and these allegations also established petitioner's "aggrieved person" status); *see generally* 2 Am. Jur. 2d *Administrative Law* §§ 443-50 (1994) ("Persons Adversely Affected or Aggrieved").

*Id.* at 588-90, 447 S.E.2d at 779-81 (alterations in original) (emphasis added).

Here, similar to *Empire Power Co.* and the cases quoted within *Empire*, Petitioners alleged substantial prejudice in that the Permit was issued without compliance with applicable regulations in that Martin Marietta's "proposed discharge of 12 million gallons of mine wastewater per day into Blounts Creek would displace native fish, macroinvertebrates (insects, mollusks, crayfish, etc.) and plants[,] and the wastewater would cause "higher flow and velocity, near neutral pH, and low tannin levels" meaning Blounts Creek would no longer qualify as swamp waters. *See generally id.*

More specifically, one of the individuals who filed an affidavit in support of Petitioners, Mr. Jimmy Daniels, averred that he was a member

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of the Pamlico-Tar River Foundation and both his “home and business, [“Cotton Patch Landing, a boat ramp and marina,”] are right on the banks of Blounts Creek.” Mr. Daniels described in detail the biodiversity in Blounts Creek and how it draws people “from all across the state[.]” Mr. Daniels averred that he boated “a couple of times a week” and enjoyed the wildlife diversity; through Cotton Patch Landing, he sells fishing supplies, stores and maintains boats, and engages in commercial activities involving his boat ramp. Mr. Daniels also noted the hundreds of thousands of dollars he has invested into his business and stated that based on his experience with Blounts Creek, he believed Martin Marietta’s wastewater being dumped “into the headwaters” “will change the way the whole system works.” Mr. Daniels explained specifically why and how the wastewater would affect his business and personal interests and noted “word of mouth concerning the discharge” had already had a negative effect on Cotton Patch Landing when a fishing tournament previously held at Cotton Patch Landing was moved due to fears over how the wastewater would impact fishing for the tournament. Mr. Daniels noted Cotton Patch Landing lost approximately \$5,000 from the tournament move. Again, Mr. Daniels is but one of many affiants noting similar issues with the wastewater being dumped into Blounts Creek. We view the interests of Mr. Daniels and other affiants about wastewater in Blounts Creek to be similar to the complainant in *Empire Power Co.*, who alleged,

as the owner of property immediately adjacent to and downwind of the site of the proposed LCTS—which will emit tons of harmful air pollutants if constructed and operated in accordance with its air quality permit—he and his family will suffer injury to their health, the value of their property, and the quality of life in their home and their community.

*Id.* at 589, 447 S.E.2d at 780.

While Martin Marietta contends that Petitioner’s alleged prejudice amounts only to speculation as to the effects of the discharge of water allowed by the Permit, allegations as to potential prejudice here are no different from the allegations of potential air pollution in *Empire Power Co.*, as the actual effects cannot be known for certain until the discharge occurs. *See generally id.*, 337 N.C. 569, 447 S.E.2d 768. In addition, this Court has clarified that in a challenge based upon an alleged failure of an agency or department of the State to follow its own guidelines, the prejudice standard differs from that in other types of civil cases. *See, e.g., N.C. Forestry Ass’n v. N.C. Dep’t of Env’t & Natural Res., Div. of*

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*Water Quality*, 357 N.C. 640, 644, 588 S.E.2d 880, 882–83 (2003) (“In general, individuals adversely affected by a discretionary agency decision generally have standing to complain that the agency based its decision upon an improper legal ground.” (citation and quotation marks omitted)). Otherwise the burden of showing substantial prejudice would be “nearly impossible”:

Because the substance of those policies required the Department to consider a number of discretionary factors, however, we pointed out that a showing of prejudice would be “nearly impossible” for the petitioner to achieve. Specifically, we observed that

to show prejudice from failure to follow policy, the petitioner would have to show, not only how he stood in relation to other employees in the same class as to type of appointment, length of service, and work performance, but he would have to show the weight which the Department would attribute to each of those factors. The Commission and the reviewing court would be relegated to speculating how the Department would weigh each factor.

Therefore, we held that it was sufficient to show prejudice for the petitioner to establish that the Department failed to follow the mandatory policies of the Commission, which had been promulgated pursuant to statutory authority. A separate showing of prejudice was unnecessary in that circumstance.

*Surgical Care Affiliates, LLC v. N.C. Dep't of Health & Human Servs.*, 235 N.C. App. 620, 627, 762 S.E.2d 468, 473 (2014) (citations and brackets omitted).

Here, Petitioners alleged that the Division of Water Resources violated its own applicable regulations by issuing the Permit to Martin Marietta which authorized “the discharge of 12 million gallons of mine wastewater into tributaries of Blounts Creek each day.” Petitioners have alleged DEQ failed to follow its own policies in issuing the Permit and that the discharge of wastewater into Blounts Creek, if done in a manner not in compliance with the applicable regulations, would damage the water quality, the fish and other biota in Blounts Creek, and the personal and commercial benefits derived from Blounts Creek. Petitioners are “within the zone of those to be protected and regulated by the statute, and rules and standards promulgated pursuant thereto, the substantive and procedural requirements of which he asserts the

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agency violated when it issued the permit.” *Empire Power Co.*, 337 N.C. at 589, 447 S.E.2d at 780. The superior court did not err in concluding Petitioners demonstrated their rights were substantially prejudiced and thus they are “person[s] aggrieved[.]” *Id.* at 590, 447 S.E.2d at 780. This argument is overruled.<sup>5</sup>

### III. Substantive Issues regarding Permit

We now turn to the substantive issues regarding issuance of the Permit.

#### A. Standard of Review

Petitioners raised three arguments regarding DEQ’s failure to ensure compliance with applicable water quality standards. The superior court determined that the ALJ’s order was in error only as to the findings and conclusion regarding that DEQ ensured “reasonable compliance with the biological integrity standard as set forth in 15A N.C.A.C. 02B .211(2), 0220(2), and 0202(11)[.]” and DEQ and Martin Marietta appeal this determination. The superior court affirmed the ALJ’s findings and conclusions regarding the other standards – swamp waters and pH standards– and Petitioners cross-appealed these determinations. We will therefore address the arguments as to each substantive issue in the order as addressed by the superior court.

The North Carolina Administrative Procedure Act (APA), codified at Chapter 150B of the General Statutes, governs trial and appellate court review of administrative agency decisions. The APA provides a party aggrieved by a

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5. Implicit in this holding is also a rejection of Martin Marietta’s argument that “North Carolina courts have held that only the state, and not individual plaintiffs, can enforce public trust rights” such as interests in fishing, boating, and recreation. As DEQ acknowledges, the cases Martin Marietta cites for this proposition are inapposite. This is not a claim under public trust doctrine or any other common law action, *see Town of Nags Head v. Cherry, Inc.*, 219 N.C. App. 66, 723 S.E.2d 156 (2012); *Fish House, Inc. v. Clarke*, 204 N.C. App. 130 (2010), but instead a request for review of an agency action pursuant to the North Carolina Administrative Procedure Act. In such an action, the organic statute at issue defines the rights, duties, and privileges that provide the grounds for the administrative hearing. *Empire Power Co.*, 337 N.C. at 583, 447 S.E.2d at 583. North Carolina’s water quality statutes and associated rules specifically protect water quality for recreational uses. *See, e.g.*, N.C. Gen. Stat. § 143-214.1(3) (2019) (directing adoption of water quality standards and classifications that consider the use and value of waters of the state for “recreation”); 15A NCAC 02b.0101(c)(1) (stating Class C are freshwaters protected for “secondary recreation” and “fishing”). Petitioners “interests in the waters affected” by the discharge at issue “are discrete and particular to [its] certain members who live near, or who visit, fish, or shell-fish in the affected waters, and are not merely a generalized public interest.” *Holly Ridge Assoc., LLC v. N.C. Dept’ of Env’t & Natural Resources*, 176 N.C. App. 594, 603, 627 S.E.2d 326, 333 (2006), *rev’d on other grounds*, 361 N.C. 531, 648 S.E.2d 830 (2007).



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final decision in a contested case a right to judicial review by the superior court. N.C. Gen. Stat. §§ 150B-43 and -50 (2017). A party to the review proceeding in superior court may then appeal from the superior court's final judgment to the appellate division. N.C. Gen. Stat. § 150B-52 (2017). The APA sets forth the scope and standard of review for each court.

*EnvironmentalLEE v. Dept of Environment*, 258 N.C. App. 590, 595, 813 S.E.2d 673, 677 (2018).

When a superior court exercises judicial review over an agency's final decision, it acts in the capacity of an appellate court. The APA limits the scope of the superior court's judicial review as follows:

(b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51 (2017). The superior court's standard of review is dictated by the nature of the errors asserted. The APA sets forth the standard of review to be applied by the superior court as follows.

(c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision



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using the *de novo* standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51(c).

*Id.* at 595-96, 813 S.E.2d at 677-78 (citations, quotation marks, and brackets omitted).

Our Supreme Court has observed that the first four grounds enumerated under this section may be characterized as law-based inquiries, whereas the final two grounds may be characterized as fact-based inquiries. Moreover, it is well settled that in cases appealed from administrative tribunals, questions of law receive *de novo* review, whereas fact-intensive issues such as the sufficiency of the evidence to support an ALJ's decision are reviewed under the whole record test.

Under the *de novo* standard of review, the Court considers the matter anew and freely substitutes its own judgment. However, our Supreme Court has made clear that even under our *de novo* standard, a court reviewing a question of law in a contested case is without authority to make new findings of fact. Under the whole record test, the reviewing court may not substitute its judgment for the ALJ's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Instead, we must examine all the record evidence—that which detracts from the ALJ's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the ALJ's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion. We undertake this review with a high degree of deference because it is well established that

in an administrative proceeding, it is the prerogative and duty of the ALJ, once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and

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circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the ALJ to determine, and the ALJ may accept or reject in whole or part the testimony of any witness.

*N. Carolina Dep't of Pub. Safety v. Ledford*, 247 N.C. App. 266, 286–87, 786 S.E.2d 50, 63–64 (2016) (citations, quotation marks, and brackets omitted).

This Court reviews the superior court's order to determine if the superior court applied the correct standard of review based upon the "grounds for reversal or modification" argued before the superior court. *EnvironmentalLEE*, 258 N.C. App. at 598, 813 S.E.2d at 678-79.

[I]n reviewing a superior court order examining an agency decision, an appellate court must determine whether the agency decision (1) violated constitutional provisions; (2) was in excess of the statutory authority or jurisdiction of the agency; (3) was made upon unlawful procedure; (4) was affected by other error of law; (5) was unsupported by substantial admissible evidence in view of the entire record; or (6) was arbitrary, capricious, or an abuse of discretion. N.C. Gen. Stat. § 150B–51 (2001). In performing this task, the appellate court need only consider those grounds for reversal or modification raised by the petitioner before the superior court and properly assigned as error and argued on appeal to this Court.

*Id.*

#### B. Applicable Regulations and Definitions

North Carolina General Statute § 143-214.1 directs the North Carolina Environmental Management Commission to classify all bodies of water<sup>6</sup> in the state and to adopt standards for each classification. *See* N.C. Gen. Stat. § 143-214.1 (2013), *see also* N.C. Gen. Stat. § 143-212 (2013). One body of water may include areas with different primary classifications and supplemental classifications, depending upon "the

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6. "(6) 'Waters' means any stream, river, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water, whether surface or underground, public or private, or natural or artificial, that is contained in, flows through, or borders upon any portion of this State, including any portion of the Atlantic Ocean over which the State has jurisdiction." N.C. Gen. Stat. § 143-212(6) (2013).

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existing or contemplated best usage of the various streams and segments of streams in the basin, as determined through studies and evaluations and the holding of public hearings for consideration of the classifications proposed.” 15A N.C.A.C. 2B.0301 (2013). The water quality standards applicable to a body of water are determined by the classification. *See generally* 15A N.C.A.C. 2B.0301 (2013). The primary classification of the portion of Blounts Creek at issue is Class C along with supplemental classifications of Sw (“swamp waters”) and NSW (“nutrient sensitive waters”). *See generally* 15A N.C.A.C. 2B.0101, .0301 (2013).

Class C classification is appropriate for “freshwaters protected for secondary recreation, fishing, aquatic life including propagation and survival, and wildlife. All freshwaters shall be classified to protect these uses at a minimum.” 15A N.C.A.C. 2B.0101 (2013). Sw classification applies to “waters which have low velocities and other natural characteristics which are different from adjacent streams.” *Id.* NSW classification applies to “waters subject to growths of microscopic or macroscopic vegetation required limitations on nutrient inputs.” *Id.* More specifically, as to supplemental classifications, Sw is defined to “mean those waters which are classified by the Environmental Management Commission and which are topographically located so as to generally have very low velocities and other characteristics which are different from adjacent streams draining steeper topography.” 15A N.C.A.C. 2B.0202. NSW is defined to “mean those waters which are so designated in the classification schedule in order to limit the discharge of nutrients (usually nitrogen and phosphorus).” *Id.*

As for the broader classification of Class C, those water quality standards are provided in 15A N.C.A.C. 2B.0211, entitled “FRESH SURFACE WATER QUALITY STANDARDS FOR CLASS C WATERS[.]” *See* 15A N.C.A.C. 2B.0211. For Class C waters, pH “shall be normal for the waters in the area, which range between 6.0 and 9.0 except that swamp waters may have a pH as low as 4.3 if it is the result of natural conditions[.]” *Id.* The “Best Usage” of Class C waters is “aquatic life propagation and maintenance of biological integrity (including fishing and fish), wildlife, secondary recreation, agriculture, and any other usage except for primary recreation or as a source of water supply for drinking, culinary, or food processing purposes[.]” *Id.* “Conditions Related to Best Usage” note “the waters shall be suitable for aquatic life propagation and maintenance of biological integrity, wildlife, secondary recreation, and agriculture. Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard.” *Id.*

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## C. Biological Integrity

[3] The trial court reversed the portion of the ALJ's final decision regarding DEQ's compliance with the biological integrity standards. Martin Marietta contends the superior court "Failed To Defer to DWR, Misinterpreted the Biological Integrity Standard, and Improperly Found Facts[.]" In other words, respondents argue the trial court made an error of law by misinterpreting the requirements of the applicable regulations as to "biological integrity," misunderstood the science behind the applicable regulations; and failed to use the proper standard of review in addressing the issues before it. Martin Marietta specifically contends,

The Superior Court failed to defer to DWR as it is required to do, misunderstood the permitting rules and what DWR did, and reversed the ALJ's holding on biological integrity under the following erroneous analysis: (1) "DWR must protect the indigenous community"; (2) the "plain language" of the standard establishes "base line metrics" that must be "determined" or "measured" to apply the standard properly; and (3) without "determining the base line metrics," DWR "could not ensure reasonable compliance" [*sic*] with the standard.

(Ellipses omitted.)

Petitioners argue the superior court correctly interpreted the biological integrity standard:

The issue before the Court is one of law: does the biological integrity standard require DWR to measure the terms in the rule and to protect the indigenous community of fish, insects, and other animals that live in Blounts Creek? The Superior Court recognized that under the lawful interpretation of the rule, DWR must measure the terms in the standard and establish specific reference conditions before issuing a permit.

As the interpretation of the biological integrity standard applied by the superior court is an issue of law, we review this determination *de novo*. *N. Carolina Dep't of Pub. Safety*, 247 N.C. App. at 286, 786 S.E.2d at 63.

This issue requires consideration of how DEQ measures and evaluates "biological integrity" as part of its general duties in protecting water quality and in the context of issuance of a Permit. The ALJ made

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extensive findings of fact and conclusions of law on this issue,<sup>7</sup> many of which Petitioners challenge:

44. Petitioners claim that, in issuing the NPDES Permit, DWR failed to reasonably ensure compliance with the biological integrity standard.

45. Under applicable North Carolina rules, one of the existing uses of all classified surface waters is “maintenance of biological integrity.” See 15A NCAC 02B .0211(1) (2013) (freshwater), and 02B .0220(1) (2013) (saltwater).

46. The term “biological integrity” is defined in 15A NCAC 02B .0202(11) as follows: “the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions.”

47. The biological integrity standards applicable to upper and lower Blounts Creek state:

the waters shall be suitable for aquatic life propagation and maintenance of biological integrity . . . . Sources of water pollution which preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard . . . .

15A NCAC 02B .0211(2) (2013) (freshwater standard). See also 15A NCAC 02B .0220(2) (2013) (same standard for saltwater).

48. DWR interprets the applicable rules and definitions to mean that an NPDES permit complies with the biological integrity standard if the permit’s terms and conditions reasonably ensure that the permitted discharge will not

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7. In Petitioners’ brief to the superior court Petitioners challenge the findings of fact and conclusions of law in such a manner that it is difficult to keep track of what actually is at issue before the court. For instance, in paragraph 81 of Petitioners’ brief they challenge findings of fact “19, 23-25,” and then in paragraph 82 they challenge findings of fact “17-20, 22-25[,]” the latter which obviously encompasses the former and broadens it; this is but one of many such examples. Petitioners have divided their challenges based upon the topic they deem to be at issue, but for this Court’s purposes we simply note that Petitioners challenged many of the ALJ’s substantive findings of fact and conclusions of law as to biological integrity, but the challenges were so extensive we have not listed all of them, although we have considered all.

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preclude maintenance of the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions.

49. The biological integrity standard is administered by DWR and relates to a highly technical and scientific subject area within DWR's expertise.

50. As required by North Carolina case law and the APA, the undersigned accords deference and gives due regard to DWR's interpretation of its own rules.

51. Even if the undersigned were not required to defer to DWR's interpretation of the biological integrity standard rules, the undersigned finds that DWR's interpretation is longstanding, is reasonable, and is consistent with and supported by the plain language of the rules, and therefore the undersigned will decide Petitioners' biological integrity claim based on DWR's interpretation of the rules.

52. The preponderance of the evidence shows that, in evaluating and determining whether the NPDES Permit reasonably ensures compliance with the biological integrity standard, DWR (through its staff) applied its knowledge and expertise, and:

- a. identified the Blounts Creek system, meaning Blounts Creek and its tributaries, as the appropriate "aquatic ecosystem";
- b. determined that the appropriate "reference conditions" were the existing conditions of the Blounts Creek system before the proposed discharge;
- c. studied and assessed the existing, pre-discharge ecological resources of the Blounts Creek system;
- d. determined the degree and geographic scope of potential physical and chemical impacts of the proposed discharge;
- e. determined the predicted changes to the ecosystem and ecological resources from the proposed discharge to be limited; and
- f. concluded that the effects predicted to occur as a result of the permitted discharge would not violate

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the standard, and, in fact, a violation would not occur unless the impacts to the Blounts Creek aquatic ecosystem were much greater in degree and geographic scope than those predicted to occur.

53. Petitioners' arguments that DWR misinterpreted and misapplied key aspects of the biological integrity standard and understated the effects of the permitted discharge present questions of law and fact, and mixed questions of law and fact. Petitioners' arguments have been thoroughly considered and rejected by the undersigned as unpersuasive and unsupported by the preponderance of evidence.

"Aquatic Ecosystem"

54. Petitioners have asserted that the relevant "aquatic ecosystem" should be defined more narrowly and that DWR must use a single stream segment as the ecosystem unit for assessing compliance. See Petition at 3.

55. The term "aquatic ecosystem" is not defined by North Carolina statute or rule.

56. The determination and application of "aquatic ecosystem" in a specific context is complex and requires significant scientific expertise and judgment, and should be accorded deference. See *County of Durham v. N.C. Dept. of Environment and Natural Resources*, 131 N.C. App. at 396-97, 507 S.E.2d at 311 (1998), disc. rev. denied, 350 N.C. 92, 528 S.E.2d 361 (1999).

57. DWR's interpretation and application of this term are reasonable, rational, and in accordance with the language and purpose of the biological integrity standard.

58. To the extent DWR's selection of an appropriate aquatic ecosystem is considered a factual determination, it is one which falls directly within the agency's expertise and is therefore entitled to "due regard" pursuant to the APA.

"Reference Conditions"

59. Petitioners have asserted that DWR failed to conduct a biological integrity analysis by inadequately sampling for "species composition, diversity, population densities and functional organization" throughout the Blounts Creek aquatic ecosystem.

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60. The determination and application of “reference conditions” in a specific context is complex and requires significant scientific expertise and judgment, and should be accorded deference.

61. DWR’s interpretation and application of this term are reasonable, rational, and in accordance with the language and purpose of the biological integrity standard.

62. To the extent DWR’s selection of appropriate “reference conditions” is considered a factual determination, it is one which falls directly within the agency’s expertise and is therefore entitled to “due regard” pursuant to the APA.

63. The preponderance of the evidence shows that Blounts Creek aquatic ecosystem’s existing conditions (“reference conditions”) are dynamic, vary over time and geographic location, and can be affected by many environmental factors.

64. The preponderance of the evidence shows that DWR had sufficient information such that the biological sampling efforts Petitioners sought were unnecessary.

65. Before issuing the Permit, DWR determined that: (a) the proposed discharge likely would not cause significant erosion or sedimentation; (b) pH likely would not exceed 6.9 in the upper Blounts Creek and was unlikely to change significantly in lower Blounts Creek; (c) relative salinity impacts would likely be on the order of 1 ppt and salinities would remain within the variability of the system; (d) shifts in macrobenthic invertebrates would likely be toward an increase in diversity and would be geographically limited to the upper reaches of Blounts Creek; and (e) the proposed discharge is not likely to adversely impact fish communities of the Blounts Creek aquatic ecosystem. These determinations by DWR are reasonable and supported by the preponderance of the evidence.

66. DWR determined that the likely effects of the permitted discharge are limited in degree, limited in geographic scope, and not deleterious.

67. The preponderance of the evidence supports DWR’s conclusion and shows that the permitted discharge will not have any significant detrimental effect on the



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Blounts Creek aquatic ecosystem, including the many miles of C and Sw stream segments of other tributaries of Blounts Creek.

Impacts of the Proposed Discharge

68. Petitioners argued that DWR underestimated or understated the effects the proposed discharge will likely have on the Blounts Creek aquatic ecosystem, including effects on flow, pH, salinity, benthos, fish, and the existing biological community of Blounts Creek.

69. DWR's findings and inferences regarding the predicted effects of the proposed discharge fall within "specialized knowledge of the agency." As such, the undersigned is required to give such facts and inferences "due regard" pursuant to the APA. N.C. Gen. Stat. § 150B-34(a).

70. The preponderance of the evidence demonstrates that DWR applied its knowledge and expertise in its collection and review of the data and reports obtained during the permitting process, and drew reasonable inferences and conclusions based on those data and reports.

71. The preponderance of the evidence demonstrates that DWR reasonably evaluated and adopted the findings of the Kimley Horn reports (Exs. R13, R15) and the CZR report (Ex. R16) after satisfying itself of the reliability of these studies.

72. The preponderance of the evidence demonstrates that: (a) DWR applied its discretion and expertise in its review of the comments it received from the public (including Petitioners[]), EPA, and other state agencies during the permitting process; and (b) the substantive comments were considered and accounted for by DWR based on DWR's expertise, judgment, and rational evaluation of the comments and other evidence.

73. To the extent Petitioners contend that DWR acted arbitrarily and capriciously in its evaluation of the evidence, its gathering and evaluation of relevant data and information, its interpretation and application of the biological integrity standard, and its conclusion that the NPDES Permit reasonably ensures compliance with the biological integrity

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standard, Petitioners failed to present any evidence that DWR acted “whimsically” or in “bad faith.”

74. The undersigned finds that DWR’s evaluation of the NPDES permit application, reports and data submitted during the permit process, the data independently collected by DWR, and the comments received from the public, state agencies and EPA was reasonable, rational, thorough, supported by a preponderance of the evidence in the record, and undertaken in good faith.

75. The undersigned finds the evidence and expert opinion testimony as well as the lay opinion testimony, even if admitted, presented by Petitioners, does not overcome DWR’s determinations, with respect to the likely impacts and effects of the permitted discharge, which were thoroughly evaluated based on DWR’s knowledge, expertise, and judgment, and well-supported by a preponderance of the evidence.

76. The undersigned has considered all of the evidence of potential impacts presented by Petitioners and their experts, and finds, based on a preponderance of the evidence, that Petitioners’ evidence either does not contradict DWR’s determinations or is not persuasive and not sufficient to overcome the data, studies, and other information reasonably considered and relied on by DWR in evaluating compliance with the biological integrity standard.

77. Petitioners failed to present evidence sufficient to overcome the presumption that DWR acted appropriately in determining the NPDES Permit reasonably ensures compliance with the biological integrity standard.

78. The preponderance of the evidence demonstrates that DWR:

- a. reasonably interpreted the biological integrity standard;
- b. reasonably and rationally applied the biological integrity standard to the relevant information and facts regarding the proposed discharge;
- c. reasonably determined that, although certain changes are predicted to occur as a result of the proposed discharge, the predicted effects would not

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preclude the ability of the relevant aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions; and

d. reasonably and rationally determined that the NPDES Permit reasonably ensures compliance with the biological integrity standard.

79. Petitioners failed to meet their burden of proving by a preponderance of the evidence that DWR exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining the NPDES Permit reasonably ensures compliance with the biological integrity water quality standard. See 15A NCAC 02B. 0202(11), 15A NCAC 02B .0211(2) (2013), and 15A NCAC 02B .0220(2) (2013).

80. DWR's decision that the NPDES Permit reasonably ensures compliance with the biological integrity water quality standard is affirmed.

The superior court did not determine that any of the findings of fact made by the ALJ were unsupported by the record, but instead determined on *de novo* review that DWR's interpretation of the "biological integrity standard rules and related definitions" was not reasonable and was "contrary to the language of the standard and definitions." The superior court rejected both DEQ's and the ALJ's interpretation of the biological integrity standard, and Martin Marietta and DEQ challenge this conclusion on appeal as reflected in their arguments that the superior court "Failed To Defer to DWR, Misinterpreted the Biological Integrity Standard, and Improperly Found Facts[:]"<sup>8</sup>

Class C waters must be "suitable for aquatic life propagation and maintenance of biological integrity" among other uses. 15A NCAC 02B.0211(2) The term "Biological Integrity" is defined by 15A NCAC 02B.202(11) as "the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms

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8. The following quote from the superior court order arguably includes some findings of fact, but the superior court stated its decision as based upon *de novo* review of a legal issue.

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having species composition, diversity, population densities and functional organization similar to that of reference conditions”.

The rules do not define the terms “species composition”, “diversity”, “population densities” or “functional organization”. Dr. Overton was offered and accepted by the AU as an expert in the field of fisheries ecology, larval fish ecology, fisheries management, and fish sampling methods and analysis. He testified that species composition counts the number of species in a system. Species diversity counts the number species present and the relative abundance of each species. Population density describes how many individuals are in a defined area and functional organization describes the organization of biological community.

Tom Reeder with DWR testified that he did not know if there was such a thing as a biological integrity analysis; that he had never really heard of such a thing. He further testified that no statutes or rules set forth numeric standards or explicit methods or metrics by which DWR must make a determination that a NPDES permit reasonably ensures compliance with the biological integrity standard. Rather, the standard requires DWR to exercise its discretion, expertise and professional judgment to determine whether the anticipated impacts of a proposed discharge are such that the discharge will preclude the ability of an “aquatic ecosystem” to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities, and functional organization “similar” to that of “reference conditions”. DWR staff conceded that the agency did not evaluate species composition, diversity, population density, or functional organization in Blounts Creek. Mr. Reeder justified the failure to evaluate these metrics by saying that he considered the impact of the permitted discharge to be *de minimus*. In essence the agency reached the ultimate conclusion that the impact of the permitted discharge was *de minimus* first, without evaluating species composition, diversity, population density, and functional organization, and then used the ultimate conclusion to conclude that evaluation of the metrics was unnecessary.

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With respect to questions of law, the reviewing court employs a *de novo* review. When applying *de novo* review, the Court may freely substitute its judgment for that of the agency. In re Appeal of N. C. Sav. & Loan League, 302 N.C. 458 (1981) Incorrect statutory interpretation is an error of law which allows the court to apply a *de novo* review. Brooks v. Rebarco, 91 N.C. App. 459 (1988) However even when reviewing a case *de novo* courts recognize the longstanding tradition of according deference to an agency's interpretation of its rules. A reviewing Court should defer to agency's interpretation of a statutes or rules it administers so long as the agency interpretation is reasonable and based upon a permissible construction of the statute or rule. County of Durham v. N.C. Dep't of Env't and Natural Res., 131 N.C. App. 395 (1998). Interpretations that conflict with the clear intent and purpose of the law are entitled to no deference. Burgess v. Your House of Raleigh, Inc., 326 N.C. 205 (1990) An agency's interpretation of its own regulations will be in enforced unless clearly erroneous or inconsistent with the regulation's plain language. WASCO LLC. V. N.C. Dep't of Env't & Natural Res., 799 S.E. 2<sup>nd</sup> 405 (2017)

The terms "species composition, diversity, populations densities, and functional organization" used in the biological integrity standard must be given meaning. Kyle v. Holston Group, 188 N.C. App. 686 (2008) The standard requires DWR to maintain the indigenous biological community by insuring that the post discharge "species composition, diversity, population densities, and functional organization are similar to that of reference conditions" determined before the discharge is permitted. The rule is clear that referenced conditions must be evaluated on the basis of and as defined in those terms. Yet the DWR staff conceded that they did not measure any of the biological integrity metrics in Blounts Creek when evaluating the permit's compliance with the standard. Thus, DWR failed to determine the base line metrics required by 15A NCAC 02B.0202(11) and could not, therefore, ensure reasonable compliance with the biological integrity standard.

The Biological integrity standard is clear; DWR must protect the indigenous community by determining reference conditions in terms of an evaluated impacts on the

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community's species composition, diversity, population density and functional organization. Reference conditions must be specific enough to allow the agency to apply the biological integrity standard properly. DWR failed to apply the plain language of the biological integrity standard. Therefore DWR did not "reasonably ensure compliance with" the biological integrity standard. Consequently the agency exceeded its authority and erred as a matter of law when issuing the permit. Based upon a *de novo* review of the biological integrity standard rules and related definitions the Court concludes that DWR's interpretation of the rule is not reasonable and is contrary to the language of the standard and definitions.

Conclusions of law 51 through 53, 61, 62, 64 through 67, 70, 75, 77 through 80, 110 through 112 are reversed.<sup>9</sup>

Ultimately, the superior court determined, contrary to the ALJ's conclusion, that DEQ's interpretation of the biological integrity standard was not reasonable and was contrary to the language of the standard and definitions. The superior court did *not* determine that the ALJ's findings of fact were unsupported by substantial evidence but instead found legal error as to the meaning and application of the biological integrity standard. The primary difference between the ALJ's order and the superior court's order is its determination of the "clear" meaning of the biological integrity standard and its resulting determination not to defer to agency expertise.

Again, the superior court concluded that

[t]he Biological integrity standard is clear; DWR must protect the indigenous community by determining reference conditions in terms of an evaluated impacts on the community's species composition, diversity, population density and functional organization. Reference conditions must be specific enough to allow the agency to apply the biological integrity standard properly. DWR failed to apply the plain language of the biological integrity standard.

But as the superior court notes, many of the operative words in the applicable regulations are not defined. Despite the superior court's

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9. This section is quoted as it was in the record before us, including spacing and punctuation.

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conclusion that “the Biological integrity standard is clear[.]” it could be *clear* only to the extent the operative terms in the standard are defined. However, the superior court applied “clear” definitions where the regulations simply do not provide definitions. The superior court defined the biological integrity standard to mean that “DWR must protect the indigenous community by determining reference conditions in terms of an evaluated impacts on the community’s species composition, diversity, population density and functional organization.” But this is not the standard as defined by the applicable regulations. Again, classification is determined by “the existing *or* contemplated best usage of the various streams and segments of streams in the basin, as determined through studies and evaluations and the holding of public hearings for consideration of the classifications proposed.” 15A N.C.A.C. 2B.0301 (2013) (emphasis added). The North Carolina Administrative Code (“Code”) contemplates the existing state of the water *or* its possible best usage. *See id.* The “Best Usage” of Class C waters is “aquatic life propagation and maintenance of biological integrity (including fishing and fish), wildlife, secondary recreation, agriculture, and any other usage except for primary recreation or as a source of water supply for drinking, culinary, or food processing purposes[.]” 15A N.C.A.C. 2B.0211. “Conditions Related to Best Usage” note “the waters shall be suitable for aquatic life propagation and maintenance of biological integrity, wildlife, secondary recreation, and agriculture. Sources of water pollution which *preclude* any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard.” *Id.* (emphasis added).

The Code does not require the biological integrity of an aquatic ecosystem to remain exactly or even substantially the same as it had once been, for example, prior to discharge. *See generally* 15A N.C.A.C. 2B.0301. To violate a water quality standard, the discharge of water must “*preclude* any of these uses on either a short-term or long-term basis[.]” 15A N.C.A.C. 2B.0211. “Preclude” is not defined in the statute, but its ordinary meaning is to “close” and “to make impossible by necessary consequence: rule out in advance[.]” Merriam-Webster’s Collegiate Dictionary 977 (11th ed. 2003). In other words, to violate a water quality standard the discharge of water must make “aquatic life propagation and maintenance of biological integrity, wildlife, secondary recreation, and agriculture” nearly impossible. 15A N.C.A.C. 2B.0211; *see generally* Merriam-Webster’s Collegiate Dictionary 977.

Further, the superior court did not reverse the ALJ’s findings of fact as to DEQ’s expertise applying the regulations which ultimately led to

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the contested conclusion by the ALJ that DEQ had complied with the biological integrity standard:

131. Mr. Reeder testified that with the assistance of DWR staff, he used his best professional judgment, experience and expertise to determine that the appropriate “aquatic ecosystem” was the watershed system of Blounts Creek and its tributaries. (Reeder, Tr. Vol. 7 pp. 1149-1150)

132. Mr. Reeder considered “reference conditions” to be the existing conditions in the Blounts Creek aquatic ecosystem without the proposed discharge. (Reeder, Tr. Vol. 7 pp. 1142-1144, 1149-1150; Reeder, Tr. Vol. 4 pp. 662-663; Fleek, Tr. Vol. 6 pp. 992-993)

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136. Mr. Reeder took into consideration and weighed Mr. Fleek’s opinions regarding the effects of the proposed discharge on benthos in the upper reaches immediately downstream of the proposed discharge outfalls. (Reeder, Tr. Vol. 4 pp. 660-661)

137. Mr. Reeder understood Mr. Fleek’s professional opinion to be that benthic macroinvertebrates would likely become more diverse near the discharge outfalls and that farther downstream any such impacts would lessen or dissipate. (Reeder, Tr. Vol. 4 pp. 660-661)

138. Mr. Reeder also understood that the many other tributaries of the Blounts Creek aquatic ecosystem, and the biota inhabiting those areas, would be unaffected by the permitted discharge. (Reeder, Tr. Vol. 7 pp. 1142-1151, 1162-1165, 1172; Reeder, Tr. Vol. 4 pp. 658-671; Ex. R23; Ex. R1; Ex. R16)

Despite these findings of fact, Petitioners argued, and the Superior Court found, that DEQ’s interpretation of the regulations and process for evaluation of the impact of the proposed discharge were not “reasonable” and thus not subject to deference.

One of respondents’ main contentions before this Court is that the superior court failed to apply the correct legal standard in deferring to DEQ as to the interpretation and application of the biological integrity standards. The superior court determined “DWR failed to determine the base line metrics required by 15A NCAC 02B.0202(11) and could not,



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therefore, ensure reasonable compliance with the biological integrity standard,” but, according to Mr. Reeder, “no statutes or rules set forth numeric standards or explicit methods or metrics by which DWR must make a determination that a NPDES permit reasonably ensures compliance with the biological integrity standard.” As DEQ explains,

the Superior Court’s “plain language” interpretation is not based on the plain language of applicable regulations at all. By stepping outside the plain language of the regulations and dictating what information the agency’s biologists and engineers must consider when evaluating compliance with a technical environmental standard, the Superior Court improperly substituted its judgment for that of the agency . . . [, and]

. . . .

As a pure question of regulatory interpretation, the Superior Court’s “plain language” reading is flatly incorrect. The “plain language” of the standard says nothing about what process the agency must go through or what information the agency must collect to reasonably ensure compliance with the standard. Rather, the regulations leave this determination to the “reasonabl[e]” discretion of DWR’s environmental scientists to be evaluated on a case-by-case basis. 15A NCAC 2H.0112(c).

The superior court considered a few lines of testimony of Mr. Reeder, “Tom Reeder with DWR testified that he did not know if there was such a thing as a biological integrity analysis; that he had never really heard of such a thing.” But this interpretation takes the testimony out of context and is not supported by the whole record as noted by the next sentence in the order noting he further testified accurately “that no statutes or rules set forth numeric standards or explicit methods or metrics by which DWR must make a determination that a NPDES permit reasonably ensures compliance with the biological integrity standard.” In fact, the superior court did not determine that the ALJ’s findings regarding DEQ’s investigation of the expected effects of the water discharge on biological integrity were not supported by the whole record, but relied upon this statement by Mr. Reeder along with an erroneous definition of “biological integrity” to conclude that

DWR staff conceded that the agency did not evaluate species composition, diversity, population density, or functional organization in Blounts Creek. Mr. Reeder justified the failure to evaluate these metrics by saying that he

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considered the impact of the permitted discharge to be *de minimus*. In essence the agency reached the ultimate conclusion that the impact of the permitted discharge was *de minimus* first, without evaluating species composition, diversity, population density, and functional organization, and then used the ultimate conclusion to conclude that evaluation of the metrics was unnecessary.

But DEQ certainly did not “concede[]” that it “did not evaluate specifies composition, diversity, population density, or functional organization[]” despite the portions of Mr. Reeder’s testimony the superior court and Petitioners take out of context. DEQ simply did not perform evaluations to *Petitioners’* desired specifications, but this is vastly different from failing to evaluate at all. The question for the superior court, and for this Court, is not whether DEQ could have done more or different testing or analysis or whether the ALJ could have found different facts. The questions before us are whether the ALJ’s findings of fact are supported by the whole record; *N. Carolina Dep’t of Pub. Safety*, 247 N.C. App. at 286, 786 S.E.2d at 64; whether DEQ evaluated the Permit application in accord with the applicable regulations; and whether DEQ’s interpretation of those regulations was reasonable. *See Hilliard v. N.C. Dep’t of Corr.*, 173 N.C. App. 594, 598, 620 S.E.2d 14, 17 (2005) (“On judicial review, an agency’s interpretation of its own regulations will be enforced unless clearly erroneous or inconsistent with the regulation’s plain language.”); *see generally N. Carolina Dep’t of Pub. Safety v. Ledford*, 247 N.C. App. 266, 286–87, 786 S.E.2d 50, 63–64 (2016) (“[O]ur Supreme Court has made clear that *even under our de novo standard, a court reviewing a question of law in a contested case is without authority to make new findings of fact. Under the whole record test, the reviewing court may not substitute its judgment for the ALJ’s as between two conflicting views*, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Instead, we must examine all the record evidence—that which detracts from the ALJ’s findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the ALJ’s decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion. *We undertake this review with a high degree of deference* because it is well established that in an administrative proceeding, it is the prerogative and duty of the ALJ, once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. *The credibility of witnesses*

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*and the probative value of particular testimony are for the ALJ to determine, and the ALJ may accept or reject in whole or part the testimony of any witness.*" (emphasis added)).

The whole record supports the ALJ's findings that DEQ evaluated species composition, diversity, population density, and functional organization in accord with its established procedures and expertise. Mr. Reeder was "the acting director of the Division of Water Quality and the director of the Division of Water Resources" when the Permit was approved; eventually the two divisions were merged. Mr. Reeder approved the Permit, but he was by no means the only employee of DEQ involved in the consideration of the Permit. Many employees of DEQ, as well as consultants including CZR Incorporated ("CZR") and Kimley-Horn and Associates ("Kimley Horn"), performed the actual sampling and analysis of water quality, fish, and benthos in Blounts Creek. Mr. Reeder testified at length regarding DEQ's investigation and analysis of "biological integrity" in Blount's Creek. As a whole, in context, Mr. Reeder testified "biological integrity" is a narrative standard, not a numeric standard:

Well, I mean you can't go to an [Standard Operating Procedure]—there's no [Standard Operating Procedure] that says biological integrity analysis. Like I couldn't call Eric Fleek on the phone and say, "Hey, Eric, go out and do a biological integrity analysis."

What you do is you go out and do exactly what Eric did, is you do a biological assessment and you look at the technical memorandum, and according to that you make a decision based upon your best professional judgment and all the data as to whether you think this narrative standard for biological integrity will be violated or not.

Mr. Eric Fleek was an environmental supervisor at DEQ. Mr. Fleek testified his branch, the Biological Assessment Branch, evaluated water quality by "sampling for fish. We also do sampling for benthic macro-invertebrates. And by assessing a water body and the biology that lives there, you can use them as proxies to determine what the water quality is like there." Mr. Fleek also testified that there were "protocols for doing that sampling" of Blounts Creek in reference to the Standard Operating Procedure.

Our record contains one of Petitioners' exhibits in arguing DEQ failed to comply with its own standards, DEQ's "STANDARD OPERATING PROCEDURE BIOLOGICAL MONITORING[,] STREAM

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FISH COMMUNITY ASSESSMENT PROGRAM[,]” (“Standard Operating Procedures”) and

the purpose of this manual [is] to provide details on standard operating procedures of the Biological Assessment Unit of the Division of Water Quality (DWQ or Division) for the collection and analysis of stream fish community assessment data. Consistency in data collection and analysis is the cornerstone for evaluating biological integrity. The procedures provided are a synthesis of widely used methods and methods developed from the experience of personnel within the Unit. These methods have been shown to provide repeatable and useful data for water quality evaluation.

....

The Stream Fish Community Assessment Program was designed as an additional basinwide assessment tool and has been in existence since 1991. Its core mission is to sample a set of fixed sites on lower Strahler order wadeable creeks, streams, and rivers on a five-year rotating basis to support the DWQ's Basinwide Management Plan Program.

While the Standard Operating Procedures address “biological integrity[,]” they do not require a particular type of analysis to be done for a Permit application; instead, the staff of DEQ uses its expertise to determine what types of testing or sampling need to be done for each application, depending upon its unique circumstances.

The Standard Operating Procedures also describe the “NORTH CAROLINA INDEX OF BIOTIC INTEGRITY” which has been in use since the early 1990s:

The Division has been monitoring the biological integrity of stream fish communities since the early 1990s. The biological monitoring tool that is used is referred to as the North Carolina Index of Biological Integrity (NCIBI). The NCIBI method was developed for assessing a stream's biological integrity by examining the structure and health of its fish community. The North Carolina Administrative Code defines Biological Integrity as: “. . . the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities, and functional

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organization similar to that of reference conditions" (15A NCAC 02B .0200; NCAC 2004). The NCIBI is a modification of the Index of Biotic Integrity (IBI) initially proposed by Karr (1981) and Karr, *et al.* (1986).

The NCIBI incorporates information about species richness and composition, trophic composition, fish abundance, and fish condition. The NCIBI summarizes the effects of all classes of factors influencing aquatic faunal communities such as water quality, energy source, habitat quality, flow regime, and biotic interactions. While any change in a fish community can be caused by many factors, certain aspects of the community are generally more responsive to specific influences. Species composition measurements reflect habitat quality effects. Information on trophic composition reflects the effect of biotic interactions and energy supply. Fish abundance and condition information indicates additional water quality effects. It should be noted, however, that these responses may overlap. For example, a change in fish abundance may be due to decreased energy supply or a decline in habitat quality, not necessarily a change in water quality.

The scores derived from this index are a measure of the ecological health of the waterbody and may not directly correlate to water quality. For example, a stream with excellent water quality, but with poor or fair fish habitat, may not be rated excellent with this index. However, a stream which rated excellent on the NCIBI should be expected to have excellent water quality.

Further, the NCIBI sets out specific metrics to assess biological integrity:

The NCIBI incorporates information about species richness and composition, pollution indicator species, trophic composition, fish abundance, fish condition, and reproductive function by the cumulative assessment of 12 parameters or metrics (Tables 1-3). Each metric is designed to contribute unique information to the overall assessment. The values provided by the metrics are converted into scores on a 1, 3, and 5 scale. A score of 5 represents conditions commonly associated with undisturbed reference streams in the specific river basin or ecoregion. A score

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of 1, however, indicates that conditions deviate greatly from those typically observed in undisturbed streams of the region. All metrics for each of the three regions were calibrated using regional reference sites.

The scores for all metrics are then summed to obtain the overall NCIBI score, an even number between 12 and 60. The score is then used to determine the biological integrity class of the stream (i.e., Poor, Fair, Good-Fair, Good, or Excellent) (Karr 1981, Karr, *et al.* 1986). A fish community rated Excellent is comparable to the best situations with minimal human disturbance; all regionally expected species for the habitat and stream size, including the most intolerant forms, are present along with a full array of size classes and a balanced trophic structure. Conversely, a fish community rated Poor deviates greatly from the reference condition. The number of fish is fewer than expected, usually fewer than expected number of species, an absence of intolerant species, and an altered trophic structure. Communities rated Good, Good-Fair, or Fair fall within this disturbance gradient.

Currently, if a fish community is rated Excellent, Good, or Good-Fair it is deemed to be Fully Supporting its Aquatic Life Use Support stream classification. If a fish community is rated Fair or Poor it is deemed to be Not Supporting its Life Use Support stream classification and the water quality standard is not being met. Waters that have an Excellent fish community rating are also eligible for reclassification to a[n] Outstanding Resource Waters or to a High Quality Waters supplemental classifications.

The Standard Operating Procedures set forth twelve metrics, grouped into five categories:

1. Species richness and composition (Metric Nos. 1 and 3-5)
2. Indicator species (Metric Nos. 6 and 7)
3. Trophic function (Metric Nos. 8-10)
4. Abundance and condition (Metric Nos. 2 and 11)
5. Reproductive function (Metric No. 12)

The particular metrics used may vary depending upon the type of water and region of the state. For example, the species of fish measured metric

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number 4 are different in mountain streams than in and around coastal waters. The Standard Operating Procedures also set out sampling procedures and instructions for laboratory processing for samples. To assess the quality of a stream, information obtained from sampling is compared to reference conditions. “The scores for all 10 or 12 metrics are then summed to obtain the overall NCIBI score. Finally, the score (an even number between 12 and 60) is then used to determine the biological integrity class of the stream from which the sample was collected[.]”

Regarding permits, the Standard Operating Procedures provide, “The location of permitted dischargers should be reviewed, using the database provided by the Division’s Basinwide Information Management System” and notes that “[w]atershed-specific special study sites that are designed to address a specific, short-term question (e.g., Use Attainability, *impacts from a permitted discharger*, watershed modifications, etc.) are usually sampled only once and may be sampled any-time between March and December.” (Emphasis added.)

As part of its analysis of the permit application, CZR did sampling and prepared a report addressing the metrics noted in the Standard Operating Procedures regarding fish and benthos. This report noted that fish surveying was done “in accordance with NCDWQ 2006 Standard Operating Procedure, Stream Fish Community Assessment Program (NCDENR 2006a).” “Benthic invertebrate sampling occurred on 11 April 2011 following the swamp stream method as described in NCDWQ 2006 Standard Operating Procedures for collection of benthic invertebrates in the Level IV Ecoregion Swamp Region B of the coastal plain of North Carolina NCDENR 2006b.”

DEQ initially reviewed Martin Marietta’s application for the Permit, then requested additional information to address several questions:

1. Please define a zone of impact (ZOI) and show that it is not degraded, considering hydraulic, biota, & saline water impacts as discussed below.

Hydraulic: The point downstream at which the proposed discharge can be considered insignificant. Consider the frequency of bank overflow and the effects of increased water levels, velocity changes, and erosion. Impacts should be based on a major rainfall event such as an 80<sup>th</sup> percentile (two in 10-year) storm, and a base flow.

Biota: The point at which the proposed discharge is considered to be insignificant, relative to anadromous



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fish (e.g. finfish) changes in velocity, pH, temperature DO. Evaluate effects during documented spawning times (as per the NC Wildlife Resources Commission and the National Marine Fisheries Service) and during periods of lower stream flows.

Saline Water: The point at which the freshwater impact of the proposed discharge is considered insignificant. Using the ZOI identified for the hydraulic component, determine the distance to a downstream point of saline stability and evaluate impacts

2. Please provide a process flow diagram for the mine dewatering and stormwater discharge, including the flow around the proposed stockpile area. What is the approximate size and capacity of the settling pond that will be located next to the mining pit?
3. What is the size and capacity of the closed loop settling system and the future overburden storage area?
4. Please provide an expanded Engineering Alternatives Analysis (EAA). This should include the alternatives of reinjection of pit drainage and the treatment and conveyance of this discharge for potable or other reusable purposes. The EAA must be performed according to the guidelines in the Division's website. This includes a 20-year present worth analysis of all feasible options.

In answer to these questions, Martin Marietta provided a Technical Memorandum prepared by Kimley Horn summarizing "the results of several analyses performed to address comments regarding stream stability, potential flooding, and water quality issues associated with the proposed discharge[.]" including "the predicted zones of potential impact[.]" a revised NPDES Water Flow Map showing "the process flow diagram for mine dewatering and stormwater discharge[.]" and "expanded Engineering Alternatives Analysis (EAA) dated September 14, 2012, prepared by Groundwater Management Associates, Inc. . . . according to the guidelines in the DWQ website and includ[ing] a 20-year present worth analysis of all feasible options." Further, in October of 2012, CZR also prepared a Technical Memorandum addressing "potential direct and indirect effects on identified fish populations from predicted changes in Blounts Creek water quality as identified by" Kimley Horn's Technical Memorandum.

In summary, hundreds of pages of the record on appeal and hundreds of pages of testimony address the analysis of "biological integrity,"



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as well as salinity, pH, and many other factors evaluated by DEQ to determine whether the Permit should be issued. To the extent that the superior court made a finding of fact in noting that

Tom Reeder with DWR testified that he did not know if there was such a thing as a biological integrity analysis; that he had never really heard of such a thing. He further testified that no statutes or rules set forth numeric standards or explicit methods or metrics by which DWR must make a determination that a NPDES permit reasonably ensures compliance with the biological integrity standard[.]

this finding is technically supported by the record because Mr. Reeder did so testify. But neither the superior court nor this Court may substitute its findings of fact for those of the ALJ; we review the ALJ's findings of fact only to determine if they are supported by the whole record. *See Ledford*, 247 N.C. App. at 286–87, 786 S.E.2d at 63–64. The ALJ's findings are supported by the whole record, as discussed above. Contrary to the superior court's conclusions, Mr. Reeder's testimony indicated the thorough and extensive evaluation that DEQ undertook to ensure biological integrity, although this cannot be neatly summed up as one official analysis plainly laid out in a specific standard operating procedure. The ALJ's findings as to the biological integrity analysis are supported by the whole record. The superior court therefore erred by essentially substituting its own findings of fact regarding Mr. Reeder's testimony and by making legal conclusions as to biological integrity based upon a misinterpretation of the standard. Therefore, as to DEQ's and Martin Marietta's main contention on appeal we agree that the trial court erred in reversing the ALJ's order as to the biological standard, and we now turn to address Petitioners' issues on cross-appeal.

#### D. Swamp Waters Classification

[4] Petitioners cross-appealed from the superior court's order based upon its determination that DEQ's approval of the Permit violated the water quality standards set forth for swamp water classification. DEQ and Martin Marietta argue we should affirm the findings and conclusions of the ALJ and superior court regarding swamp waters. As noted above, a body of water may have a supplemental classification in addition to its primary classification. *See generally* 15A N.C. Admin. Code 2B.0301. The portions of Blounts Creek at issue have a supplemental classification of "swamp waters" which again is defined as "those waters which are classified by the Environmental Management Commission and which are

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topographically located so as to generally have very low velocities and other characteristics which are different from adjacent streams draining steeper topography.” 15A N.C.A.C. 2B.0202. Swamp water classification applies to “waters which have low velocities and other natural characteristics which are different from adjacent streams.” 15A N.C.A.C. 2B.0101.

The ALJ identified the issue regarding swamp waters as follows:

Issue 2: “Swamp Waters Claim”: Whether Petitioners have met their burden of proving that Respondent exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining the NPDES Permit reasonably ensures compliance with water quality standards and regulations related to the “Swamp Waters” supplemental classification.

The ALJ made the following findings regarding the swamp water classification:

18. Contrary to Petitioners’ assertions, the evidence demonstrates that the “swamp method” and the term “swamp stream” in the SOP are unrelated to the “swamp waters” supplemental classification. (Fleek, Tr. Vol. 7 pp. 1103-1105; Ex. R34, p.6; Fleek, Tr. Vol. 6 pp. 980-981; Ex. P58; Ex. P59)

19. Mr. Fleek reviewed the CZR Habitat Assessment and provided input to Mr. Belnick. In Mr. Fleek’s evaluation, he concluded that there could be an increase in diversity and population of benthos near the proposed discharge outfalls because the discharge would lead to less stressful conditions. (Fleek, Tr. Vol. 7 pp. 1108-1111, 1114-1116; Ex. R4; Ex. 51)

....

Petitioners’ Swamp Waters Claim

81. Petitioners claim that the NPDES Permit does not reasonably ensure compliance with what Petitioners characterize as a requirement to “protect” swamp waters “characteristics.” Petition 4-5.

82. “Swamp Waters” are defined as “waters which are classified by the Environmental Management Commission and which are topographically located so as to generally have very low velocities and other characteristics which

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are different from adjacent streams draining steeper topography.” 15A NCAC 02B.0202(62). See also 15A NCAC 02B.0101(e)(2) and 02B .0301(c).

83. Petitioners claim that DWR has a duty to preserve swamp waters in their existing condition, and they objected to the predicted changes in physical and chemical parameters in upper Blounts Creek, specifically dissolved oxygen, pH, flow velocity, and tannins. Petitioners have characterized the predicted changes to these parameters as unlawfully eliminating swamp waters characteristics and uses.

84. DWR disagrees with Petitioners in that DWR has a duty under the applicable rules and laws to preserve waters with the supplemental classification “swamp waters” in their existing condition. DWR asserts, consistent with its longstanding interpretation and past practices, that the only effect of the Sw supplemental classification is to modify the water quality standards for dissolved oxygen and pH by lowering the minimum limits otherwise required for Class “C” waters. See 15A NCAC 02B .0211(3)(b) and (3)(g) (2013).

85. Petitioners failed to identify any statute or rule that expressly protects “low tannins”, “low pH”, “low dissolved oxygen”, or “low velocity” attributes of swamp waters.

86. Petitioners have not cited a law or rule that requires additional protection or use for waters with the supplemental classification “swamp waters.”

87. The swamp waters supplemental classification and the water quality standards administered by DWR relate to a highly technical and scientific subject area within DWR’s expertise.

88. As the agency delegated the responsibility for NPDES permitting and enforcement of North Carolina’s water quality standards, DWR’s interpretation and application of the State’s water quality standards, and its surface water classifications and supplemental classifications are entitled to deference. *Hilliard v. N.C. Dept. of Corrections*, 173 N.C. App. 594, 598, 620 S.E.2d 14, 17-18 (2005).

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89. DWR's interpretation and application of the highly technical rules it administers, including the swamp waters and antidegradation rules, are reasonable, longstanding, in accord with past DWR practices, and consistent with and supported by the plain language of the relevant rules.

90. Petitioners have presented no evidence, authority, or argument that persuades the undersigned to overrule DWR's rational interpretation and application of the State's swamp waters and antidegradation laws and rules.

91. Some supplemental classifications may trigger protection or uses in addition to the protections or uses for Class C waters. For example, the "Outstanding Resource Waters" supplemental classification states that such waters "require special protection to maintain existing uses." 15A NCAC 02B .0101(e)(4).

92. The specificity of additional protections and uses explicitly applicable by rule to some supplemental classifications is further evidence that, if the "swamp waters" supplemental classification was intended to provide additional protections, the rules would have specifically provided for such protections. See, e.g., *Mangum v. Raleigh Bd. Of Adjustment*, 196 N.C. App. 249, 255, 674 S.E.2d 742, 747 (2009) ("One of the longstanding rules of interpretation and construction in this state is *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another.") (citations omitted).

93. The term "swamp waters" is a regulatory term that guides the assignment of the Sw supplemental classification to particular stream segments; and once the assignment is made by rule, the only regulatory effect of the assignment of the swamp waters supplemental classification is to lower the acceptable minimum values for pH and dissolved oxygen. See 15A NCAC 02B .0211(3)(b) and (3)(g) (2013). Upper Blounts Creek, for example, has been assigned the "Sw" supplemental classification by formal rulemaking. 15A NCAC 02B .0316(a) (Index Number 29-9-1-(1)).

94. Petitioners' arguments that DWR misinterpreted and misapplied the swamp waters supplemental classification present questions of law and fact, and mixed questions of

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law and fact. Petitioners' arguments have been thoroughly considered and rejected by the undersigned as unpersuasive and unsupported by the preponderance of evidence.

95. Petitioners rely on a sentence from the State's antidegradation policy: "Existing uses, as defined by Rule .0202 of this Section, and the water quality to protect such uses shall be protected by properly classifying surface waters and having standards sufficient to protect these uses." 15A NCAC 02B .0201(b). See Petition at 4-5.

96. According to its plain language, this provision is implemented by formal rulemaking that establishes classifications, uses and water quality standards, and that assign classifications, uses and standards to individual surface water segments. See, e.g., 15A NCAC 02B .0211 (2013) (uses and standards for Class C waters, including waters with the supplemental "Sw" classification), 15A NCAC 02B .0316(a) (Index Number 29-9-1-(1) (assignment of classifications to upper Blounts Creek).

97. There are antidegradation permitting procedures that did apply to DWR's evaluation and issuance of the NPDES Permit, but Petitioners have not argued that these applicable procedures were not followed.

98. The preponderance of the evidence demonstrates that DWR reasonably interpreted the laws and rules governing swamp waters and the state's antidegradation policy, and reasonably applied those laws and rules to the data, studies, and other information submitted or obtained during the course of DWR's NPDES permitting review and decision.

99. Petitioners failed to present evidence sufficient to overcome the presumption that DWR acted appropriately in determining the NPDES Permit reasonably ensures compliance with water quality standards or regulations related to the "Swamp Waters" supplemental classification.

100. Petitioners failed to meet their burden of proving by a preponderance of the evidence that DWR exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by law or rule in determining that

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the laws and rules do not require protection of the existing conditions or characteristics of surface waters with the supplemental classification “swamp waters” and that the NPDES Permit reasonably ensures compliance with water quality standards and rules related to the “Swamp Waters” supplemental classification.

101. DWR’s decision that the NPDES Permit reasonably ensures compliance with all applicable water quality standards and rules, including those relating to the swamp waters supplemental classification, is affirmed.

....

110. Petitioners failed to present evidence sufficient to overcome the presumption that DWR acted appropriately in issuing the Permit.

111. Petitioners failed to meet their burden of proving Respondent DWR exceeded its authority or jurisdiction, acted erroneously, acted arbitrarily and capriciously, used improper procedure, or failed to act as required by law or rule in issuing the NPDES Permit.

112. DWR’s issuance of the NPDES Permit is affirmed in all respects.

....

119. Petitioners contend that the NPDES Permit is unlawful because the Permit does not reasonably ensure compliance with what Petitioners characterize as a requirement to “protect” swamp waters “characteristics,” which they contend include “low velocity,” “low dissolved oxygen,” “low pH,” and “high tannins.” (Petition 4-5)

120. “Swamp Waters” are defined as “waters which are classified by the Environmental Management Commission and which are topographically located so as to generally have very low velocities and other characteristics which are different from adjacent streams draining steeper topography.” 15A NCAC 2B.0202(62). See also 15A NCAC 2B .0101(e)(2) and 2B .0301(c).

121. The “swamp waters” supplemental classification modifies the water quality standards for dissolved oxygen and pH in the upper Blounts Creek segment by lowering

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the minimum pH and dissolved oxygen values otherwise required for Class "C" waters:

(b) Dissolved oxygen: . . . for non-trout waters, not less than a daily average of 5.0 mg/l with a minimum instantaneous value of not less than 4.0 mg/l; swamp waters, lake coves or backwaters, and lake bottom waters may have lower values if caused by natural conditions;

. . . .

(g) pH: shall be normal for the waters in the area, which generally shall range between 6.0 and 9.0 except that swamp waters may have a pH as low as 4.3 if it is the result of natural conditions[.]

15A NCAC 2B .0211(3)(b), (g) (2013)

122. Under DWR's longstanding interpretation of the statutes and rules that it administers, the supplemental classification of swamp waters does not provide any additional protections to water bodies to which it is assigned; and low flow and velocity, low pH, low dissolved oxygen, and high tannins are not uses, standards, characteristics, or parameters of swamp waters that are required to be maintained or protected. (Reeder, Tr. Vol. 7 pp. 1154-1157; Reeder, Tr. Vol. 4 pp. 653-657; Belnick, Tr. Vol. 4 pp. 523-524, 557-558; Reeder, Tr. Vol. 4 pp. 653-657; Belnick, Tr. Vol. 6 pp. 1059-1060)

123. The CZR report states that with the proposed discharge, upper Blounts Creek may no longer exhibit intermittent flow, low dissolved oxygen concentrations, and high tannins. (Ex. R16 p. 10)

124. The report also states that, with the proposed discharge, the use of the swamp stream sampling method may no longer be appropriate to evaluate benthic macro-invertebrates. (Ex. R16 p. 10)

125. The report does not state that the swamp waters supplemental classification requires the preservation or maintenance of low dissolved oxygen, high tannins, low velocities, and low pH as contended by Petitioners. (Ex. R16 p. 10)

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126. Based on the evidence before it, DWR concluded that the Permit reasonably ensures compliance with all applicable water quality standards, including those applicable to upper Blounts Creek, which has a C primary classification and a Sw supplemental classification.

(Alterations in original.)

The superior court affirmed the ALJ's final decision as to the swamp water classification issue. The superior court stated the issue as follows

II. Did the ALJ err in upholding DWR's issuance of the Permit as reasonably ensuring compliance with:

A. The swamp waters supplemental classification and antidegradation rule[.]

The superior court addressed Petitioners' swamp water claim as follows:

North Carolina's water quality regulations protect North Carolina's surface waters by: (1) establishing surface water classifications based primarily on the "best uses" of surface waters, *see* 15A NCAC 02B .0101; N.C. Gen. Stat. § 143-214.1(b); (2) establishing water quality standards that protect assigned uses of "primary classifications," *see, e.g.*, 15A NCAC 02B .0211 (water quality standards for Class C waters); and (3) assigning classifications to individual segments of surface waters throughout the State, *see* 15A NCAC 02B .0201 *et seq.* Some segments are also assigned "supplemental classifications," which may alter water quality standards otherwise applicable. *See* 15 NCAC 02B .0101(e). The state antidegradation rule provides that "[e]xisting uses . . . and the water quality to protect such uses shall be protected by properly classifying surface waters and having standards sufficient to protect these uses." 15A NCAC 02B .0201(b).

The Permit authorizes Martin Marietta to discharge commingled stormwater and groundwater from two settling basins at its proposed quarry into the upper reaches of Blounts Creek. The parties do not dispute the primary classification and supplemental classifications assigned to Blounts Creek. Blounts Creek from its source to Herring Run (referred to by the parties as "upper Blounts Creek") is assigned the primary classification of Class C and the supplemental classifications of Swamp Waters ("Sw") and Nutrient Sensitive Waters ("NSW").



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Petitioners argue that assignment of the swamp waters supplemental classification to upper Blounts Creek affixed “swamp water habitat” as a “special use” of that portion of the Creek; in turn, Petitioners argue, the antidegradation rule requires DWR to protect certain “natural characteristics” of swamp waters such as “low flow,” “low velocity,” and “dark color.”

The ALJ rejected Petitioners’ argument, concluding that the swamp waters supplemental classification does not provide any additional protections to swamp waters beyond the water quality standards for protecting the uses of Class C waters. The ALJ concluded the only effect of the swamp waters supplemental classification is to make the water quality standards for pH and dissolved oxygen less stringent than otherwise required for Class C waters. Final Decision Conclusion of Law (“COL”) ¶ 93.

The Court reviews the ALJ’s conclusions of law and statutory and regulatory interpretations *de novo* and findings of fact under the whole record test.

“Swamp waters” are defined as “those waters which are classified by the Environmental Management Commission and which are topographically located so as to generally have very low velocities and other characteristics which are different from adjacent streams draining steeper topography,” 15A NCAC 02B .0202(62), or “waters which have low velocities and other natural characteristics which are different from adjacent streams.” 15A NCAC 02B .0101(e)(2). DWR interprets state water quality rules to require no additional protection for water segments assigned the swamp waters supplemental classification (beyond the protections required by the standards for the primary water quality classification, which in this case is Class C), an interpretation the ALJ considered *de novo* and upheld as reasonable and consistent with the plain language of North Carolina’s water quality standards. Final Decision COL ¶¶88-90, 98.

The Court reviews this regulatory interpretation issue *de novo* and affirms the ALJ conclusion.

Interpretation of administrative regulations “properly begins with the plain words” of the regulation. *Cole v. N.C. Dep’t of Pub. Safety*, 800 S.E.2d 708, 714 (N.C. Ct. App.), *disc. rev. denied*, 803 S.E.2d 156 (2017). The

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Court's *de novo* review of the antidegradation rule and rules governing the swamp waters supplemental classification shows that no "plain words" identify or protect a swamp waters "use" or identify or protect swamp waters "characteristics." 15A NCAC 02B .0202(62), .0101(e)(2), .0211(6), .0211(14), .0220(5), .0220(12), .0301(c).

The Court's *de novo* review of the water quality rules as a whole indicates that if the North Carolina Environmental Management Commission ("EMC") intends to protect a particular attribute or condition or use of surface waters, it does so in the text of its rules. With respect to uses of a surface water, the rules explicitly identify the uses associated with primary surface water classifications and, in some cases, supplemental classifications, and state narrative and numeric water quality standards to protect such uses. *See, e.g.*, 15A NCAC 02B .0101(c)-(e), .0211(1), .0212(1), .0214(1), .216(1), .0218(1), .0219(1), .0220(1), .0221(1), .0222(1), .0231(a). There is no such identification of uses for the swamp waters supplemental classification and no effect on applicable water quality standards except to make less stringent the standards for pH and dissolved oxygen that would otherwise apply. The plain language and structure of the water quality rules indicates there is no intent to protect any alleged "use" particular to the swamp waters supplemental classification. *See, e.g., Mangum v. Raleigh Bd. of Adjustment*, 196 N.C. App. 249, 255, 674 S.E.2d 742, 747 (2009) ("One of the long-standing rules of interpretation and construction in this state is *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another.").

Similarly, with respect to characteristics of a water body, the rules show that the EMC knows how to protect a specific characteristic if it so desires. For example, the water quality rules establish explicit flow requirements for high quality waters. 15A NCAC 02B .0224(1)(v) (setting maximum volume of wastewater discharge into high quality waters). There is no text in the swamp waters supplemental classification rules (or elsewhere in the water quality rules) requiring protection of particular "swamp water characteristics." With the exception of "low velocity," the characteristics cited by Petitioners — "periods of low or no flow, low velocity, low pH, low dissolved

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oxygen, and high tannin levels” — do not appear in any water quality rule. References in the rules to “low velocity” pertain only to a quality that swamp waters “generally have,” 15A NCAC 02B .0202(62), not to a quality those waters must have. Significantly no rules protect or assure that waters with the swamp waters supplemental classification will have low velocity, periods of low or no flow, or high tannin levels. The Court is not vested with rule making authority. The water quality standards for pH and dissolved oxygen applicable to Class C waters are made less stringent for water bodies with the swamp waters supplemental classification, and this appears to the Court to be the only effect of that supplemental classification. 15A NCAC 02B .0211(3)(b), (g) (2013).

Even if Petitioners’ interpretation of the swamp waters and antidegradation rules could be characterized as reasonable, DWR’s interpretation nonetheless is reasonable and is affirmed. The Court notes that, as found by the ALJ, and supported by substantial evidence in the record as a whole, DWR’s interpretation is longstanding and consistent with the plain language and the structure of the water quality rules. The Court gives deference to DWR’s interpretation that the water quality rules do not create special protections for characteristics such as “low flow, low velocity, and dark color,” or otherwise.

The Court also notes that the state’s water quality rules provide a means by which the EMC may classify waters as High Quality Waters or classify unique and special surface waters of the state as Outstanding Resource Waters, and thereby provide a means of protecting certain characteristics of those waters that are not otherwise protected by water quality standards. 15A NCAC 02B .0225(a)(2). The record evidence does not show that Petitioners have sought such regulatory protections for Blounts Creek. 15A NCAC 02B .0225.

The Court is not persuaded that *PUD No. 1 v. Washington Department of Ecology*, 511 U.S. 700 (1994), supports Petitioners’ Swamp Waters Claim. Petitioners have not shown that there is any designated use associated with the “swamp waters” supplemental classification that is required to be maintained or protected under North Carolina’s water quality rules or otherwise.

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The Court has reviewed the Final Decision findings in relation to Petitioners' Swamp Waters Claim, *see, e.g.*, Final Decision FOF ¶¶119-126, 158-202, and based on its review of the whole record, the Court concludes that substantial evidence supports these findings. These findings support the ALJ's conclusion that Petitioners failed to carry their burden before OAH to prove DWR acted erroneously or arbitrarily or otherwise unlawfully in determining that the Permit reasonably ensures compliance with all applicable water quality standards, including the swamp waters supplemental classification and the state antidegradation rule.

The Final Decision findings of fact and conclusions of law and holding that Petitioners failed to carry their burden and that the Permit reasonably ensures compliance with the swamp waters supplemental classification and the state antidegradation rule are affirmed and upheld.

Petitioners do not challenge the facts as found by the ALJ or discussed by the superior court regarding swamp waters but rather argue "[t]he issue before the Court is one of law: does Blounts Creek's classification as swamp waters protect the creek's use as a unique habitat?" Petitioners contend that DEQ and the superior court interpreted the swamp water secondary classification as serving only "to weaken the creek's protections, to allow for more pollution in Blounts Creek," and if the classification were interpreted properly, the swamp waters classification "is like all other water classifications in North Carolina—it protects our creeks and rivers." Petitioners further contend the swamp waters classification actually gives "additional protection for waterways that have special characteristics found in swamp waters and, as a result provides habitat for the fish, insects, and other animals that are well suited to that environment." Thus, Petitioners argue that the secondary classification of swamp waters requires that the natural characteristics of swamp water to remain essentially unchanged and that DEQ's "extreme interpretation" of the swamp waters classification as accepted by the ALJ and superior court, "does not provide any protection at all" and "only weakens . . . standards to allow for more pollution in Blounts Creek."

Martin Marietta contends that neither North Carolina law nor the Clean Water Act ("CWA") require "'natural' conditions or characteristics" of a body of water to remain unchanged. Martin Marietta contends both state and federal law recognize the need to balance many interests and needs related to use of water and water quality, including public health, fish and wildlife, recreation, industry, and agriculture:

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The CWA requires each State to adopt and implement water quality standards, which “consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses.” 33 U.S.C.A. § 1313(c)(2)(A).

Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

33 U.S.C. § 1313(c)(2)(A) (emphasis added); *see PUD No. 1*, 511 U.S. at 704.

Martin Marietta argues that

[t]he very existence of the NPDES program refutes the theory that the CWA requires “natural” conditions or characteristics to remain unchanged. The program provides for the issuance of permits that authorize discharge of wastewater into waters of the U.S. 33 U.S.C. § 1342. By introducing wastewater into a water body, the quality and quantity of the water in the receiving water body necessarily changes.

Petitioners counter that DEQ has previously taken a position contrary to its position in this case as it “enforced against a polluter for not adequately protecting swamp waters” in the case of *House of Raeford Farms, Inc. v. North Carolina Department of Environmental and Natural Resources*, 242 N.C. App. 294, 774 S.E.2d 911 (2015). Petitioners, quoting *House of Raeford*, contend that DEQ’s previous interpretation of the swamp waters classification was “that ‘the designated uses for the swamp waters . . . were deemed to be impaired.’” But *House of Raeford* does not contradict DEQ’s action in this case.

In *House of Raeford*, DEQ investigated pollution in a creek, ultimately tracing the source to House of Raeford’s chicken processing facility. *See id.* DEQ representatives found that

“the creek was just full of sludge from bank to bank and as far as the eye could see. It was an unbelievable site.”

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She testified the sludge was fresh because it was a light tan color: "It starts out looking like a milkshake and then as it decomposes, it gets darker because of the septicity." The sludge adhered to the shorelines and was so thick on the surface of the water that it had formed ridges. The sludge was darker and thinner downstream from the House of Raeford.

*Id.* at 297, 774 S.E.2d at 914 (brackets omitted). "[F]ecal samples from Cabin Branch Creek, directly behind the House of Raeford facility . . . confirmed a fecal coliform density greater than 60,000 colonies per 100 milliliters" and based upon this contamination, "the designated uses for the swamp waters below the House of Raeford facility were deemed to be impaired." *Id.* at 297-98, 774 S.E.2d at 914.

Contrary to Petitioner's argument, *House of Raeford* demonstrates that swamp waters do have protection, but that protection is consistent with the water quality standards established for Class C waters. *See id.* at 300, 774 S.E.2d at 916. In *House of Raeford*, DEQ

assessed civil penalties against House of Raeford as follows:

\$25,000 for violation of N.C. Gen. Stat. § 143-215.1(a)(6); causing or permitting waste to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, unless allowed as a condition of any permit, special order or other appropriate instrument issued or entered into by the Commission under the provisions of the Article.

\$25,000 for violation of 15A N.C.A.C. 2B.0211(3)(b); violating the dissolved oxygen water quality standard for Class C-Sw waters of the State.

\$25,000 for violation of 15A N.C.A.C. 2B.0211(3)(c); by allowing settleable solids and sludge in excess of the water quality standard for Class C-Sw waters of the State.

*Id.* at 308, 774 S.E.2d at 920. Thereafter,

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The ALJ found the imposition of civil penalties under 15A N.C.A.C. 2B.0211(3)(b) and 15A N.C.A.C. 2B.0211(3)(c) were erroneous, but upheld the imposition of the \$25,000.00 fine under N.C. Gen. Stat. § 143–215.1(a)(6). The [Environmental Management Commission] imposed a total maximum civil penalty of \$50,000.00 against House of Raeford for violation of N.C. Gen. Stat. § 143–215.1(a)(6) and 15A N.C.A.C. 2B.0211(3)(c).

The superior court assessed a civil penalty of \$25,000.00 for violation of N.C. Gen. Stat § 143–215.1(a)(6) for causing or permitting waste to be discharged into or intermixed with the waters of the State in violation of the water quality standard set forth in 15A N.C.A.C. 2B.0211(3)(c).

*Id.* at 308, 774 S.E.2d at 920–21.

*House of Raeford* addressed penalties for discharge of waste in violation of water quality standards in a manner not allowed by a permit and as such was an enforcement action for a water quality violation and not a proceeding for a permit application as presented by this case. *See id.*, 242 N.C. App. 294, 774 S.E.2d 911. North Carolina General Statute 143-215.1 recognizes that some discharges of waste which may otherwise not be allowed under applicable water quality standards may be allowed as provided by a permit:

(a) Activities for Which Permits Required. – Except as provided in subsection (a6) of this section, no person shall do any of the following things or carry out any of the following activities *unless that person has received a permit from the Commission and has complied with all conditions set forth in the permit:*

....

- (6) Cause or permit any waste, directly or indirectly, to be discharged to or in any manner intermixed with the waters of the State in violation of the water quality standards applicable to the assigned classifications or in violation of any effluent standards or limitations established for any point source, *unless allowed as a condition of any permit, special order or other appropriate*

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*instrument issued or entered into by the  
Commission under the provisions of this Article.*

N.C. Gen. Stat. § 143-215.1 (2013) (emphasis added).

We agree with Martin Marietta's and DEQ's interpretation of the law in that protection does not require that Blounts Creek remain entirely the same. Further, as the ALJ determined and the superior court affirmed, "DWR concluded that the Permit reasonably ensures compliance with all applicable water quality standards, including those applicable to upper Blounts Creek, which has a C primary classification and a Sw supplemental classification." The findings of fact establish that the discharge of water into Blounts Creek may change some areas of the aquatic ecosystem and the changes will vary based upon distance from the outfall. For example, "there could be an increase in diversity and population of benthos near the proposed discharge outfalls because the discharge would lead to less stressful conditions." The superior court acknowledges the discharge of water will change Blounts Creek, but keeping that change within acceptable limits is the purpose of the Permit. The Permit allows changes to the waters of Blounts Creek in accord with the limitations and provisions of the Permit, and those limitations are in accord with water quality standards applicable to Class C waters. On *de novo* review of Petitioners' issue "of law[.]" the ALJ and superior Court correctly concluded that DEQ's issuance of the Permit did not violate water quality standards as applicable to "swamp waters" of Blounts Creek.

E. pH Water Quality Standards

[5] Much like the previous argument, Petitioners' argument as to pH is based in large part on the characteristics of the secondary classification of swamp waters. Petitioners argue that the ALJ and superior court erred in approving the Permit because the wastewater will increase the pH in Blounts Creek to "to levels that do not occur naturally and are not characteristic of swamp waters." Essentially, Petitioners argue that the water quality standards for pH mandate that the swamp waters retain all of their characteristics, including low pH. Petitioners contend that

[l]ow pH is a defining characteristic of swamp waters and is essential to maintaining habitat that is protected by the swamp waters classification. The permit allows Martin Marietta to increase pH in Blounts Creek to levels that do not occur naturally and are not characteristic of swamp waters. Under existing conditions, pH in Blounts Creek is as low as 4.37 and is almost always below 6.0.



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(T2 p 342:15-17, 357:8-358:15 [App. 24, 25-26]); (*see also* R p 1199). The permit allows Martin Marietta to increase pH to 8.5. (*See* R p 1589-1615).

The issue before the Court is one of law: does the pH standard protect the normal, natural pH of Blounts Creek?

Martin Marietta contends that if the regulations were interpreted and applied as Petitioners argue

it would: (1) transform a straightforward water quality standard for pH into a byzantine and costly regulatory maze consisting of thousands of different sets of mandatory pH values or ranges; (2) force DWR to implement an expensive, time-consuming, and essentially unworkable site-by-site regulatory scheme to establish separate “normal” pH for each stream segment; and (3) create a new source of regulatory uncertainty, cause delay in permitting and enforcement, and impose the expense of sampling and analysis anytime there is a need to know the pH standard applicable to a water body segment. Such an exorbitantly resource-intensive agency activity is not feasible, not necessary, and not dictated by the language of the pH standard.

The ALJ made the following findings regarding pH:

106. The water quality standard governing pH for upper Blounts Creek requires that pH “shall be normal for the waters in the area, which generally shall range between 6.0 and 9.0 except that swamp waters may have a pH as low as 4.3 if it is the result of natural conditions.” 15A NCAC 2B .0211(3)(g) (2013).

107. DWR’s longstanding interpretation of the pH standard for Class C water bodies is that the pH must be 6.0 to 9.0; but if the water body has a supplemental classification of swamp waters (Sw), the lower range of pH can be extended down to 4.3 (if the low pH is caused by natural conditions). Thus, the pH standard for a C, Sw water body would be 4.3 to 9.0. (Belnick, Tr. Vol. 4 pp. 524, 632; Reeder, Tr. Vol. 4 pp. 653-657)

108. No evidence was presented that DWR has ever interpreted the pH standard differently.

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109. No evidence was presented that DWR has ever interpreted or applied the pH standard to require that low pH must be maintained in Sw waters. (Belnick, Tr. Vol. 4 pp. 524, 631-632; Reeder, Tr. Vol. 4 pp. 653-657)

110. DWR does not interpret the standard to require site-specific sampling and analysis. (Belnick, Tr. Vol. 4 p. 562)

111. Rather the standard itself defines “normal” pH to be 6.0 to 9.0 in Class C waters, with permissible lower values (down to 4.3) in Sw waters if the lower values are caused by natural conditions. (Reeder, Tr. Vol. 4 pp. 653-657)

112. DWR’s longstanding interpretation is also reflected in NPDES permits issued across the State and in DWR’s assessment of waters for impairment. (Reeder, Tr. Vol. 4 pp. 653-657)

113. Available data indicate that the existing pH in upper Blounts Creek ranges from approximately 4.5 downstream from the outfalls to approximately 5.3 to 6.5 at Dr. Bean’s upstream sampling site. (Ex. P12; Ex. P23)

114. The expected pH of the discharge effluent is approximately 6.9; and the pH in upper Blounts Creek with the permitted discharge is expected to range from approximately 6.3 to 6.9. (Ex. R1 p.4; Ex. P21)

115. Dr. Bean agreed with the Kimley Horn report prediction that the pH of upper Blounts Creek would not exceed 6.94 at full discharge.<sup>10</sup> (Ex. P12 p. 36)

116. The Permit requires that the pH of the permitted discharge be within the range of 5.5 to 8.5. Thus, the pH of upper Blounts Creek with the permitted discharge is predicted and required to remain within the range of 4.3 to 9.0. (Ex. R29)

117. Petitioners’ attorneys conceded that the pH of neither the discharge nor the effluent would be in excess of 9 or below 4.3. (Tr. Vol. 4 p. 657)

118. Based on the evidence before it, DWR concluded that the Permit reasonably ensures compliance with the pH water quality standard.

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10. Dr. Eban Bean was a witness for Petitioners.

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The superior court affirmed the ALJ's findings and conclusions as to pH, as follows:

At the time the Permit was issued, the pH standard for Class C waters applicable to upper Blounts Creek read as follows:

pH: shall be normal for the waters in the area, which generally shall range between 6.0 and 9.0 except that swamp waters may have a pH as low as 4.3 if it is the result of natural conditions.

15A NCAC 02B .0211(3)(g) (2013).

In their pH Claim, Petitioners argue that the rule required DWR to undertake site-specific sampling to determine what "normal" pH is for the receiving waters in the area of the proposed discharge, which, in turn, must be maintained. Petitioners argue that: DWR did not determine "normal" pH for upper Blounts Creek; the Permit pH limit of 5.5 to 8.5 allows the permitted discharge to cause upper Blounts Creek to exceed its "normal" pH; and the Permit therefore fails to reasonably ensure compliance with the pH standard.

DWR interprets the pH standard as setting a maximum allowable pH of 9.0 and a minimum allowable pH of 6.0, except that the lower limit may be as low as 4.3 in swamp waters, if pH below 6.0 is the result of natural conditions. DWR interprets the rule as not requiring site-specific sampling or testing. Based on its interpretation of the pH rule, DWR established a Permit limit for pH of the discharge effluent of 5.5 to 8.5.

The ALJ concluded that DWR's interpretation is reasonable and consistent with the plain language of the rule, and rejected Petitioners' pH claim because the Permit's pH limits reasonably ensure compliance with the pH standard.

The Court reviews the ALJ's factual determinations under the whole record test and asserted legal errors and interpretation of rules *de novo*.

The Court is not persuaded that the pH rule creates or requires a site-specific standard for pH in receiving waters. First, the interpretation of administrative regulations "properly begins with the plain words" of the regulation. *Cole*, 800 S.E.2d at 714. The "plain words" of the pH rule

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do not require a site-specific standard or site-specific sampling to determine a site-specific standard. The rule states that pH “shall be normal for the waters in the area,” and then provides that: (a) “normal for the waters in the area” “generally shall range between 6.0 and 9.0,” and (b) a lower pH may be allowed (to a minimum of 4.3) “if it is the result of natural conditions.” DWR interprets the rule itself to define what “normal” pH is for a stream segment that has been assigned the classifications Class C-Sw: 6.0 to 9.0, or 4.3 to 9.0 if the lower pH results from natural conditions.

Second, as noted in the Final Decision, this interpretation is supported by the EMC’s 2014 technical amendment, which deleted the words “generally shall” from the pH standard. 15A NCAC 02B .0211(14) (2015). This technical amendment further clarifies that “normal for waters in the area” is defined by the numerical range set forth in the text of the rule. Moreover, the current text of the pH rule is consistent with the language of other water quality standards that explicitly state the numeric limits required. *See, e.g.*, 15A NCAC 02B .0211(3), (5), (6), (9), (11). The only exception to the applicable pH range is in swamp waters, where the lower limit may be decreased — made less stringent — if low pH is the result of natural conditions.

Third, the state’s water quality standards make clear that site-specific standards are the exception, not the norm, and are explicitly set forth where they exist. *E.g.*, 15A NCAC 02B .0110 (requiring site-specific strategies for waters providing habitat for federally listed threatened and endangered species), .0211(11) (allowing creation of site-specific standard for metals), .0226 (providing that “site-specific water quality standards may be granted by the Commission on a case-by- case basis”). No site-specific standards for pH are described or required in the water quality rules applicable here.

Fourth, even if Petitioners’ proposed interpretation of the pH standard were reasonable, in reviewing agency regulatory interpretations, the Court agrees with the ALJ’s determination that DWR’s interpretation is reasonable and consistent with the plain language

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of the regulation. The Court accords deference to that interpretation.

Based on the Court's *de novo* interpretation of the pH rule, the Court upholds DWR's interpretation of the pH rule and declines to accept Petitioners' claim that the rule requires site-specific assessment.

The Court has reviewed the Final Decision findings in relation to Petitioners' pH Claim, *see, e.g.*, FOF ¶¶90, 104-118, 145-151, 164-170, and based on its review of the whole record, the Court concludes that substantial evidence supports these findings, and that Petitioners failed to carry their burden before OAH to prove DWR acted erroneously or arbitrarily or otherwise unlawfully in determining that the Permit reasonably ensures compliance with the pH standard.

The Final Decision findings of fact and conclusions of law and holding that Petitioners failed to carry their burden and that the Permit reasonably ensures compliance with the pH standard are affirmed and upheld.

The Superior Court correctly addressed each of the Petitioners' arguments. As the ALJ and Superior Court determined, the DEQ's interpretation of the pH rules is reasonable and consistent with the regulations. The regulations do not require that the pH of swamp waters stay the same as they currently are and that no new discharges be allowed if the discharge would change the pH. Again, the law requires the balancing of many interests and expertise in analyzing the conditions of the waters affected by each permit application. On *de novo* review of Petitioners' issue "of law[.]" the ALJ and superior court correctly concluded that DEQ's issuance of the Permit did not violate pH water quality standards of Blounts Creek.

#### F. Reopener Provision

**[6]** Petitioners last argue that the "required reopener provision does not authorize DWR to issue a permit expected to violate water quality standards." (Original in all caps.) Petitioner notes that

[f]or *unexpected* water quality standard violations that occur *after* a permit is issued, DWR has the authority to reopen and modify a permit—a condition that is memorialized in standard conditions for all discharge permits. *See* 15A N.C. Admin. Code 02H .0114(a) [App. 140]; 40 C.F.R. §§ 122.41(a) and 122.41(f) [App. 105-6]

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(R p 1603). This standard condition has been referred to as a “reopener provision.”

(Emphasis added.) Petitioners contend the superior court erred by determining that the reopener provision “can absolve the agency of its obligation to deny a permit without ensuring compliance with either the swamp waters classification or the pH water quality standard.”

Martin Marietta argues that the premise of Petitioner’s argument is erroneous because “the Permit reasonably ensures compliance with and does not violate any water quality standards, and Petitioners failed to carry their burden of proof to show otherwise.” As already noted, we agree. Neither the ALJ nor superior court determined that a reopener provision can “absolve” DEQ of compliance with water quality standards. Instead, the ALJ determined the Permit reasonably ensures compliance with the water quality standards, and the superior court determined the Permit reasonably ensured compliance with all water quality standards except “biological integrity,” but we have reversed that conclusion.

The Permit was issued based upon predictions of the expected impact of the discharge of wastewater into Blounts Creek, but if those predictions prove to be wrong, DEQ has authority to modify or revoke the Permit. To ensure compliance with water quality standards, the ALJ found the Permit requires monitoring of Blounts Creek after discharge of water from the quarry begins:

145. On July 24, 2013, DWR issued the final NPDES Permit in the same form as it had been presented to the EPA. (Belnick, Tr. Vol. 6 pp. 1053-1054; Ex. R29; Ex. R27).

146. The Permit terms include discharge controls, effluent and instream monitoring, and benthic biological monitoring requirements. (Ex. R29)

147. Effluent monitoring requirements include flow, total suspended solids, total iron, turbidity, settleable solids, total nitrogen, total phosphorus, temperature, and pH. (Ex. R29 pp.3-4)

148. The Permit also requires instream monitoring at two downstream stations (D1 and D2) for pH, salinity, temperature, and turbidity. (Ex. R29)

149. The Permit requires benthic sampling at four locations, the results of which must be submitted at least six months prior to the expiration of the permit (which

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expires every five years). (Belnick, Tr. Vol. 6 pp. 1054-1055; Fleek, Tr. Vol. 7 pp. 1123-1128; Ex. R29)

150. The benthic monitoring provision requires submission of a sampling plan to DWR for approval prior to sampling, and requires compliance with DWR sampling protocols. (Fleek, Tr. Vol. 7 pp. 1123-1128; Ex. R29)

In addition, the Permit requires Martin Marietta “to obtain other state authorizations for its proposed quarry” which also address “potential impacts on water quality,” including “a certification under Section 401 of the Clean Water Act and a consistency concurrence from the North Carolina Division of Coastal Management (“DCM”).” The ALJ order also found:

153. On May 15, 2013, DWR issued Water Quality Certification DWQ #11-1013 (“401 Certification”) to Respondent-Intervenor. (Ex. MMM46)

154. The 401 Certification requires, among other things: (a) that construction activities must follow best management practices “so that no violations of state water quality standards, statutes, or rules occur”; (b) a monitoring plan for some of the same concerns raised and addressed in the NPDES permit process, including: “measures to monitor physical and chemical stability of headwater streams to ensure that the project does not result in violation of water quality standards,” and an annual report summarizing the monitoring results; and (c) that Martin Marietta conduct the authorized activities “consistent with State water quality standards.” (Ex. MMM46 pp. 4-6)

155. DWR is authorized to modify the 401 Certification, if needed, to ensure compliance. (Belnick, Tr. Vol. 6 pp. 1064-1068; Ex. MMM46 p. 6)

156. In February 2014, DCM issued Coastal Management Program Consistency Concurrence DCM #20120010 (“Coastal Consistency Concurrence”) that requires Respondent-Intervenor to, among other things: (a) coordinate with DCM to develop fisheries monitoring that will assess impacts of the proposed project on fish species and habitat in the Blounts Creek system; (b) coordinate with DCM to develop a monitoring protocol that will assess potential impacts of the proposed project on stream bank

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stability within the Blounts Creek system; (c) comply with the NPDES Permit and provide a copy of all benthic monitoring reports to DCM; and (d) comply with the 401 Certification and provide a copy of all wetland hydrology monitoring reports to DCM. (Belnick, Tr. Vol. 6 pp. 1057-1059; Ex. R32 p. 2)

157. DWR may revisit the NPDES Permit and modify or revoke it at any time based on information from the monitoring and reporting requirements of the Permit as well as information collected pursuant to the Coastal Consistency Concurrence and the 401 Certification. (Reeder, Tr. Vol. 7 pp. 1151-1153; Ex. R32; Belnick, Tr. Vol. 6 pp. 1059; Ex. R32; Ex. R29)

This Court addressed a similar argument regarding potential future water quality violations in *Deep River Citizens' Coalition v. North Carolina Department of Environment and Natural Resources*, 165 N.C. App. 206, 598 S.E.2d 565 (2004). The Petitioner argued the Environmental Management Commission ("EMC") and trial court erred by determining the Randleman Dam and Reservoir project "would not violate certain water quality standards[,] specifically "water quality standards for chlorophyll *a*." *Id.* at 209, 598 S.E.2d at 567. Petitioners contended the computer models used by EMC to predict the effects of the project on chlorophyll *a* level were "flawed and unreliable." *Id.* at 212, 598 S.E.2d at 569. Although some models predicted chlorophyll levels within the applicable standard, other computer models predicted levels in excess. *See id.* This Court noted that when

the Director of the Division of Water Quality issued the 401 Certification, he was aware of the potential for water quality standard violations and "specifically considered the existing Randleman Lake Water Supply Watershed Nutrient Management Strategy and the opportunity that the State would have to impose additional restrictions on nutrient sources in the event of actual or threatened water quality standard violations after the reservoir is constructed." We agree with respondents that "no one will know precisely whether or to what extent exceedances . . . of the Standard will occur until construction of the dam and impoundment of the lake have been completed" but that mere "knowledge of the potential for exceedances . . . of the chlorophyll *a* standard was not sufficient to preclude DENR from issuing the 401 Certification." The trial



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court therefore had before it substantial and competent evidence that, in the event water quality standards were actually threatened, the State could impose additional restrictions to avoid chlorophyll *a* violations. We conclude the trial court did not err in concluding that DENR provided reasonable assurance that the State's water quality standards would not be violated by the proposed project.

*Id.* at 213, 598 S.E.2d at 569 (brackets omitted).

Just as in *Deep River*, “no one will know precisely whether or to what extent” violations of various water quality standards, including standards not addressed in this opinion, may occur until after discharge of wastewater begins. *Id.* The ALJ and superior court determined that the Permit reasonably ensures compliance with water quality standards, but the Permit requires specific monitoring and reports, and if a violation does occur, DEQ can modify or revoke the Permit to prevent further violations of water quality standards. The reopener provision in no way allows DEQ “to issue a permit expected to violate water quality standards” as Petitioner contends. This argument is without merit.

#### IV. Conclusion

Ultimately, we affirm the superior court's order as to the ALJ's conclusions on compliance with pH standards and swamp water and reverse the superior court's order as to the ALJ's findings and conclusions on compliance with the biological integrity standards. As a practical matter, this means the ALJ correctly determined the Permit was properly and validly issued in accord with applicable regulations.

**AFFIRMED in part; REVERSED in part.**

Judge BROOK concurs in part and concurs in the result in part with separate opinion.

Judge HAMPSON concurs in part and dissents in part with separate opinion.

BROOK, Judge, concurring in part and concurring in the result in part.

I agree with the lead opinion's rejection of Martin Marietta's motion to dismiss. I further agree with the lead opinion's conclusion that Petitioners demonstrated their rights were substantially prejudiced and are thus “person[s] aggrieved” within the meaning of Section 150B-23(a).

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And I agree with the lead opinion's rejection of Petitioners' argument pertaining to the reopener provision. Accordingly, I join these portions of the opinion in full.

I also agree with the lead opinion that we must affirm the superior court's order as to DEQ's compliance with the swamp waters supplemental classification and the pH water quality standards. I further agree that we must reverse the superior court's order as to the ALJ's findings and conclusions regarding compliance with the biological integrity standard. I concur only in the result as to these issues, however, because I would decide them strictly on the basis of the deference owed DEQ's interpretation of these regulations and the ALJ's assessment of the record.

As the lead opinion notes, the crux of the dispute is whether DEQ misinterpreted the biological integrity, swamp water, and pH regulations and, as a result, failed to engage in a sufficiently rigorous process.

The scope of our review as to these issues is limited. "[U]nless clearly erroneous or inconsistent with the regulation's plain language[.]" we defer to "an agency's interpretation of its own regulations[.]" *Hilliard v. N.C. Dep't of Corr.*, 173 N.C. App. 594, 598, 620 S.E.2d 14, 17 (2005). And, in assessing whether the factual record evinces compliance with the agency's interpretation of its regulations, we are similarly constrained:

[O]ur Supreme Court has made clear that even under our *de novo* standard, a court reviewing a question of law in a contested case is without authority to make new findings of fact. Under the whole record test, the reviewing court may not substitute its judgment for the ALJ's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*. Instead, we must examine all the record evidence—that which detracts from the ALJ's findings and conclusions as well as that which tends to support them—to determine whether there is substantial evidence to justify the ALJ's decision. Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion. We undertake this review with a high degree of deference because it is well established that "[i]n an administrative proceeding, it is the prerogative and duty of the ALJ, once all the evidence has been presented and considered, to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise

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conflicting and circumstantial evidence. The credibility of witnesses and the probative value of particular testimony are for the ALJ to determine, and the ALJ may accept or reject in whole or part the testimony of any witness.'

*N.C. Dep't of Pub. Safety v. Ledford*, 247 N.C. App. 266, 286-87, 786 S.E.2d 50, 63-64 (2016) (internal citations and marks omitted) (quoting *City of Rockingham v. N.C. Dep't of Env't. & Natural Res., Div. of Water Quality*, 224 N.C. App. 228, 239, 736 S.E.2d 764, 771 (2012)).

These standards compel us to affirm the ALJ here. As discussed by the lead opinion, the agency's interpretations of its own regulations in question are not clearly erroneous. Further, and again as chronicled by the lead opinion, there is evidence (much of it unchallenged by Petitioners and thus binding on our Court) a reasonable mind might accept as adequate to support the ALJ's conclusions that DEQ complied with its long-standing regulatory interpretations in issuing this permit.

I write separately because, pursuant to the controlling case law and standard of review, I would stop there. Whatever the merits of agency deference, it governs our deliberation and, coupled with the deference owed to the ALJ, decides this case.

I respectfully concur in part and concur in the result in part.

HAMPSON, Judge, concurring in part and dissenting in part.

I agree with the majority opinion's conclusion Petitioners demonstrated their rights were substantially prejudiced and are "person[s] aggrieved" within the meaning of Section 150B-23(a). I also concur in the majority opinion's conclusions the trial court should be affirmed as to the ALJ's conclusions on compliance with pH standards and swamp water. I dissent, however, from the majority opinion's conclusion the trial court erred by failing to give DWR's interpretation of the "biological integrity standard" appropriate deference. Rather, I would affirm the trial court's conclusion DWR did not demonstrate compliance with the biological integrity standard. As such, I would affirm the trial court's Order in full including, specifically, the determination the ALJ's Final Decision should be reversed and the Permit be revoked.

The role of an appellate court in reviewing a trial court's order affirming a decision by an administrative agency is two-fold. We must: (1) determine the appropriate standard of review and, when applicable, (2) determine whether the trial court properly applied this

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standard. *De novo* review is applied where an error of law is alleged.

*York Oil Co. v. N.C. Dep't of Env't, Health, & Natural Res.*, 164 N.C. App. 550, 554, 596 S.E.2d 270, 273 (2004) (citations and quotation marks omitted). As the majority opinion notes, the issue before this Court is a question of law reviewed *de novo*. See *N.C. Dep't of Pub. Safety v. Ledford*, 247 N.C. App. 266, 286, 786 S.E.2d 50, 63 (2016).

“ ‘When the issue on appeal is whether a state agency erred in interpreting a regulatory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review.’ ” *York Oil Co.*, 164 N.C. App. at 554, 596 S.E.2d at 273 (citing *Britt v. N.C. Sheriffs' Educ. and Training Stds. Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998)). “[A]n administrative agency’s interpretation of its own regulation should be accorded due deference unless it is plainly erroneous or inconsistent with the regulation.” *Id.* at 554-55, 596 S.E.2d at 273 (citation and quotation marks omitted). Consequently, “[a]lthough the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding.” *WASCO LLC v. N.C. Dep't of Env't & Nat. Res.*, 253 N.C. App. 222, 228, 799 S.E.2d 405, 410-11 (2017) (citing *Savings & Loan League v. Credit Union Comm.*, 302 N.C. 458, 465-66, 276 S.E.2d 404, 410 (1981) (quotation marks omitted)).

“It is the public policy of the State to maintain, protect, and enhance water quality within North Carolina.” N.C. Gen. Stat. § 143-211(b) (2019). Accordingly, the North Carolina Environmental Management Commission is required to adopt water quality standards for bodies of water throughout North Carolina. See N.C. Gen. Stat. §§ 143-214.1, -212. As the majority opinion detailed, Blounts Creek is classified as a Class C body of water with additional portions classified as Sw and NSW. Bodies of water that fall under Class C classification are subject to the water quality standards set forth in 15A N.C.A.C. 2B.0211. Notably, the best usage of Class C waters includes “aquatic life propagation and *maintenance of biological integrity* (including fishing and fish), wild-life, secondary recreation, agriculture[.]” 15A N.C.A.C. 2B.0211(1) (2018) (emphasis added).

“Biological integrity” is defined as “the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions.” 15A N.C.A.C. 2B.0202(11) (2018). Therefore, as a Class C body of water, emissions into Blounts Creek must not impair the biological integrity of

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the water body. *See* 15A N.C.A.C. 2B.0211(2) (“Sources of water pollution that preclude any of these uses on either a short-term or long-term basis shall be considered to be violating a water quality standard[.]”).

I would affirm the trial court’s conclusion DWR “did not ensure reasonable compliance with the biological integrity standard set forth in 15A N.C.A.C 02B.0211(2), 0220(2) and 0202(11).” I recognize this Court affords deference to an agency’s interpretation of its own regulations; however, that necessarily means the agency actually has an interpretation of the regulation. In the present case, the Record does not indicate DWR had any interpretation for the “biological integrity standard” that it employed when evaluating the water quality standards prior to issuing the NPDES permit at issue to which deference is due. Instead—as the majority opinion notes and the ALJ found—final decision maker and Director of DWR

Mr. Reeder testified that he ‘[did not] know if there is such a thing’ as a biological integrity analysis, and he ‘never really heard of such a thing’ in that there are no statutes or rules setting out numeric standards or explicit methods or metrics by which DWR must make a determination that an NPDES permit reasonably ensures compliance with the biological integrity standard.

Further, “Mr. Fleek provided review, input, and opinions as to potential biological effects, Mr. Fleek was not asked to provide, nor did he provide, an opinion as to whether proposed discharge would comply with the biological integrity standard.”

The majority opinion here relies on the fact that there “are no statutes or rules setting out numeric standards or explicit methods or metrics by which DWR must make a determination” in concluding that DWR was entitled to our deference in its interpretation of the biological integrity standard. Indeed, after the fact, DWR now contends it complied with the biological integrity standard because the “Standard Operating Procedure” encompasses the parameters defined in 15A N.C.A.C. 2B.0202(11) as supporting biological integrity. However, this ignores the requirement that the parameters supporting biological integrity be considered together and *before* the issuance of the NPDES permit.

In this regard, unlike the majority, I see no conflict between the ALJ’s findings of fact and the trial court’s findings and legal conclusions. The ALJ documented the actions taken by DWR in reviewing the Permit Application but yet accepts that none of those actions were taken in the context of a specific analysis of biological integrity. This is not in tension

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with the trial court's decision. To the contrary, the trial court determined, notwithstanding DWR's efforts to retroactively justify its decision, the regulation is clear: in reviewing a Permit Application, DWR is required to undertake sufficient analysis to ensure the biological integrity standard (as that term is defined) is met.<sup>1</sup> It is just as clear on this Record, DWR did not undertake that analysis in reviewing the application.<sup>2</sup> Thus, as the trial court concluded, DWR was not entitled to any deference in how it interpreted or analyzed a biological integrity standard that it failed to interpret or analyze. Put another way: interpreting the regulation requiring DWR to reasonably ensure any discharge would not preclude the protected use of Blounts Creek to maintain its biological integrity in a manner that allows DWR to functionally ignore that very requirement during the permitting process would be plainly inconsistent with the plain language of the regulation and, thus, DWR is not entitled to any deference in such an interpretation. *Pamlico Marine Co., Inc. v. N. C. Dep't of Natural Resources*, 80 N.C. App. 201, 206, 341 S.E.2d 108, 112 (1986) ("Ordinarily, an administrative agency's interpretation of its own regulation is to be given due deference by the courts unless it is plainly erroneous or inconsistent with the regulation." (citation omitted)).

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1. I do not read the trial court's decision as declaring every aspect of the biological integrity standard, its component parts, or the specific measurements required to be clear and unambiguous and not subject to any deference in its interpretation and application. Rather, I read the trial court's decision as concluding simply that the regulation expressly and clearly requires DWR, in reviewing an application, to specifically undertake steps to ensure compliance with the biological integrity standard, including analysis of the definitional components of that standard. It is no stretch to further conclude that in order to ascertain whether or not a proposed application would preclude "the ability of an aquatic ecosystem to support and maintain a balanced and indigenous community of organisms having species composition, diversity, population densities and functional organization similar to that of reference conditions[.]" 15A N.C.A.C. 2B.0202(11) (2018), an affirmative determination of the "reference conditions" is necessarily required.

2. Indeed, on this Record, there is reason to believe had DWR contemporaneously conducted any type of analysis envisioned by the regulation, it may well have reached a different conclusion. For example, the Record reflects email correspondence in which Mr. Fleek notes:

The biota presently found in the Blounts Creek system is adapted to intermittent flow, low pH, and low dissolved oxygen. The proposed discharge will alter the natural physico-chemical [sic] parameters of this system . . . . As such, many of the taxa currently found in this system which are adapted to the natural condition will be replaced by taxa that are adapted to more permanent flows, higher pH, and higher dissolved oxygen levels. The taxa that are naturally occurring to this type of stream system will be replaced with taxa that are not typical to this type of system. . . . These types of streams, and the taxa which inhabit them, are not normally found in North Carolina's coastal plain.

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I therefore disagree with the majority opinion and would affirm the trial court's conclusion DWR did not reasonably demonstrate compliance with the biological integrity standard. Accordingly, I would also affirm the trial court's Order requiring the Permit be revoked.

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STATE OF NORTH CAROLINA  
v.  
ZACCAEUS LAMONT ANTHONY

No. COA19-894

Filed 2 June 2020

**1. Appeal and Error—preservation of issues—pretrial motion to suppress—necessity to object at trial—necessity to move to strike**

Where defendant was charged with offenses involving possession of a weapon and his pretrial motions to suppress his stop and search were denied, defendant failed to preserve his right to challenge the stop and search on appeal when he did not object at trial to the State's question to the officer regarding the search, he did not move to strike the evidence when he objected after the officer answered the question, and he did not assert plain error on appeal.

**2. Appeal and Error—effective assistance of counsel—concession—statement of law**

Defendant did not receive ineffective assistance of counsel at a pretrial suppression hearing in a weapon possession case where his counsel admitted that the officer's observation of a bulge in defendant's pocket gave the officer reasonable suspicion to conduct a pat down search. Counsel's statement was not a concession but was an accurate statement of the law. Therefore, counsel's subsequent argument that the officer decided to pat down defendant prior to observing the bulge was not deficient.

Appeal by defendant from judgments entered 11 February 2019 by Judge Andrew Taube Heath in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 May 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Zachary Padget, for the State.*



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[271 N.C. App. 749 (2020)]

*Mark Hayes for defendant-appellant.*

TYSON, Judge.

Zaccaeus Lamont Anthony (“Defendant”) appeals from judgments entered upon the jury’s verdicts finding him guilty of carrying a concealed weapon, possession of a firearm by a felon, possession of a weapon on educational property, and attaining habitual felon status. We find no error.

**I. Background**

Johnson C. Smith University police officer Todd Sherwood received a call from a security officer at a campus entrance traffic booth at approximately 12:55 a.m. on 3 November 2017. Some female students reported their concern that a vehicle was following their vehicle onto campus. Officer Sherwood spoke to the women, who identified the vehicle they believed was following them. Officer Sherwood told the women to go to their dorm, make sure they were not followed, and stay there.

The women drove off. Officer Sherwood saw the identified vehicle approach him as it followed the women onto campus property. Officer Sherwood stopped the vehicle to address the women’s concerns and to question whether its occupants were students and their reason for being on campus. Officer Sherwood observed two men inside the car: Jerome Houston the driver, and Defendant in the passenger seat.

Officer Sherwood detected the odor of alcohol and saw an open beer can inside the vehicle. The men told Officer Sherwood they were not students at the University and they “just wanted to talk to the girls that were in the car ahead of them.” Houston gave Officer Sherwood his consent to search the vehicle. Officer Sherwood asked Houston to step out of the vehicle for a pat down.

Officer Sherwood then approached Defendant’s side of the vehicle and asked Defendant to step out of the vehicle. As Defendant stepped out the vehicle, Officer Sherwood noticed a bulge, which weighed down the front pocket of the hoodie Defendant was wearing. Officer Sherwood asked Defendant if he had any weapons on him. Defendant replied he did not.

Officer Sherwood patted Defendant down and asked him what was inside the front pocket. Defendant said he had keys in the front pocket, which he removed upon Officer Sherwood’s request. Officer Sherwood noticed the bulge was still present and still weighing down the front



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pocket. Officer Sherwood patted Defendant down a second time and “noticed a distinct outline of a handgun.”

Officer Sherwood took Defendant into custody and removed the handgun from Defendant’s pocket. Defendant was indicted for: (1) carrying a concealed weapon; (2) possession of a firearm by a felon; (3) carrying a weapon on educational property; and, (4) attaining the status of habitual felon.

Defendant filed his first motion on 18 April 2018 to suppress all evidence obtained during or subsequent to the stop. He alleged Officer Sherwood had seized Defendant without reasonable suspicion and in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States. The trial court held a hearing and denied Defendant’s first motion on 5 November 2018.

Defendant filed a second motion on 4 February 2019 to suppress all evidence seized from Defendant resulting from Officer Sherwood’s pat downs. He alleged Officer Sherwood did not have a reasonable and articulable suspicion that Defendant was either armed or dangerous when he searched Defendant’s person. The trial court held another hearing and denied Defendant’s second motion on 6 February 2019.

The jury found Defendant guilty of all charged offenses. Defendant stipulated to and the trial court found Defendant was a prior record level III offender, with three prior weapons offenses. Defendant was sentenced in the presumptive ranges to concurrent, active sentences of 84 to 113 months for carrying a concealed weapon, 96 to 128 months for possession of a firearm by a felon, and 33 to 52 months for possession of a weapon on educational property. Defendant entered his notice of appeal in open court.

## II. Jurisdiction

An appeal as of right lies with this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2019).

## III. Issues

Defendant argues the trial court erred by denying his first motion because Officer Sherwood had no reasonable suspicion to stop the car. Defendant also argues the trial court erred by denying his second motion because Officer Sherwood had no reasonable and articulable suspicion to believe Defendant was armed or dangerous to search his person. In considering the reasonable suspicion, Defendant argues the evidence of the “bulge” should not be considered. Lastly, Defendant argues he received ineffective assistance of counsel.

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IV. Preservation

[1] The State argues Defendant waived his asserted issues concerning the trial court's denial of his motions to suppress by failing to timely object at trial before the jury. We agree.

In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1).

A motion *in limine* is "not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000) (citation omitted), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001). Failure to object at trial waives appellate review, when evidence is tendered after counsel sought to exclude the evidence in a pre-trial motion to suppress or a motion *in limine*. *State v. McClary*, 157 N.C. App. 70, 74, 577 S.E.2d 690, 692-93 (2003) (citations omitted). "A motion *in limine* will not preserve for appeal the issue of the admissibility of evidence if the defendant fails to further object to that evidence *at the time it is offered* at trial." *Id.* (emphasis original) (citations and internal quotation marks omitted).

Where the inadmissibility of testimony "is not indicated by the question, but becomes apparent by some feature of the answer . . . the objection should be made as soon as the inadmissibility becomes known, and should be in the form of a motion to strike out the answer or the objectionable part of it." *State v. Battle*, 267 N.C. 513, 520, 148 S.E.2d 599, 604 (1966) (citation omitted). Where a defendant does not move to strike an inadmissible answer, his objection is waived. *Id.* (citations omitted); *see also State v. Adcock*, 310 N.C. 1, 19, 310 S.E.2d 587, 598 (1984) ("When the question does not indicate the inadmissibility of the answer, defendant should move to strike as soon as the inadmissibility becomes known. Failure to so move constitutes a waiver." (citation omitted)).

In this case, after Officer Sherwood testified that during the pat down, he felt the "distinct outline of a handgun," the prosecutor asked, "What did you do at that point?" Officer Sherwood testified he took Defendant into custody and removed the handgun from the front pocket

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of the hoodie. After Officer Sherwood's answer, Defendant's counsel said: "And, Your Honor, if I may just for the record make our objection based on our pretrial rulings and motions." The trial court noted Defendant's objection for the record and overruled it.

The evidence Defendant now challenges, to suppress the handgun Officer Sherwood recovered, was elicited by Officer Sherwood's answer, not the prosecutor's question. Defendant was obligated to move to strike Officer Sherwood's answer after objecting for the record and before the jury to preserve his objection.

[A] witness may insert in his answer something which was beyond the question, but when that occurs the attorney for the complaining party should move to strike or to limit the reply, as the interest of his client may require. *Even valid objections may be, and are usually waived in the ordinary case by failure to follow the recognized practice by motion to strike or by motion to limit if the evidence is not competent[.]* This appears to be such a case.

*Battle*, 267 N.C. at 520-21, 148 S.E.2d at 604 (emphasis supplied); *see also State v. Carter*, 210 N.C. App. 156, 165, 707 S.E.2d 700, 707, *disc. review denied*, 365 N.C. 202, 710 S.E.2d 9 (2011).

Defendant failed to object to the State's question before Officer Sherwood testified about the handgun, which he now challenges. Neither did Defendant move to strike Officer Sherwood's testimony after it was given. Defendant failed to adequately preserve this issue for appellate review.

In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal *when the judicial action questioned is specifically and distinctly contended to amount to plain error*.

N.C. R. App. P. 10(a)(4) (emphasis supplied).

Defendant failed to assert or argue plain error in his brief. Since Defendant's brief did not specifically and distinctly allege the admission of the now-challenged evidence amounted to plain error, he is not entitled to appellate review under Rule 10(a)(4). *See State v. Smith*, \_\_ N.C. App. \_\_, \_\_, 837 S.E.2d 166, 169 (2019) (citation omitted). Defendant's arguments concerning the admission of evidence about the handgun are unpreserved and waived. *See id.*

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V. Ineffective Assistance of Counsel

[2] Defendant next asserts ineffective assistance of counsel during the hearing on his second motion to suppress. To show ineffective assistance of counsel, Defendant “must show that his counsel’s conduct fell below an objective standard of reasonableness.” *State v. Braswell*, 312 N.C. 553, 561-62, 324 S.E.2d 241, 248 (1985) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 693 (1984)).

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693; *see also Braswell*, 312 N.C. at 562, 324 S.E.2d at 248.

Defendant’s counsel consistently argued at the hearing on the second motion to suppress that Officer Sherwood’s pat down of Defendant was unconstitutional. He argued: “At the time that Officer Sherwood frisked Mr. Anthony, he had no reasonable and articulable suspicion that Mr. Anthony was either armed or dangerous.” After the trial court concluded Officer Sherwood did have the requisite, reasonable suspicion to pat Defendant down, Defendant’s counsel said:

Right. And to be perfectly candid with the Court, I do think that there is case law, both federal and state case law that says that when an officer observes a bulge that that creates the necessary reasonable and articulable suspicion . . . I think that the moment that Officer Sherwood sees a bulge . . . that he can do a pat down.

Defendant’s counsel went on to assert Officer Sherwood had decided to pat down Defendant before he saw the bulge. On appeal, Defendant argues he may have received ineffective assistance of counsel, if the trial court considered his counsel’s candid statement to be a concession, rather than an argument in the alternative.

Defendant cannot show he received ineffective assistance of counsel under the standard of *Braswell* and *Strickland*. His counsel’s candid statement was an accurate statement of law. His subsequent argument

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about the timing of Officer Sherwood's decision to pat Defendant down was not deficient performance. Further, Defendant cannot show he was prejudiced. The trial court did not consider or rely upon his counsel's candid statement as a concession when it ruled upon Defendant's second motion to suppress. Defendant's argument is overruled.

VI. Conclusion

A motion *in limine* is "not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial." *Golphin*, 352 N.C. at 405, 533 S.E.2d at 198. Defendant objected after the evidence he now challenges on appeal was introduced at trial, and he did not move to strike the evidence. His objection to the admission of this evidence is waived. *See Battle*, 267 N.C. at 520, 148 S.E.2d at 604.

Defendant did not specifically and distinctly allege and argue in his brief that the trial court plainly erred in denying his motions to suppress. Defendant is not entitled to plain error review under N.C. R. App. 10(a)(4). *See Smith*, \_\_ N.C. App. at \_\_, 837 S.E.2d at 169.

Defendant failed to show he received ineffective assistance of counsel where his counsel's performance was not deficient, nor was he prejudiced by his counsel's performance. Defendant received a fair trial, free from prejudicial errors he preserved and argued.

We find no reversible errors to warrant a new trial. *It is so ordered.*

NO ERROR.

Judges BERGER and COLLINS concur.

**STATE v. CAMPBELL**

[271 N.C. App. 756 (2020)]

STATE OF NORTH CAROLINA

v.

MICHAEL ERIC CAMPBELL, DEFENDANT

No. COA19-865

Filed 2 June 2020

**Drugs—trafficking—knowing possession—sufficiency of the evidence**

The trial court erred by denying defendant’s motion to dismiss the charge of trafficking in methamphetamine for insufficiency of the evidence where, after law enforcement arranged for an informant to sell defendant methamphetamine, defendant inspected the methamphetamine (which was a mixture that contained methamphetamine) and stated it was “fake” or “re-rock” and handed it to someone else just before officers came into the room to arrest him. Because the State presented no evidence defining “re-rock” and the only evidence before the jury was that defendant thought the drug was fake, and no evidence supported an inference that defendant intended to continue the transaction, there was insufficient evidence defendant knowingly possessed methamphetamine.

Judge BERGER dissenting.

Appeal by Defendant from judgment entered 28 February 2019 by Judge David A. Phillips in Cleveland County Superior Court. Heard in the Court of Appeals 31 March 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General William D. Walton, for the State.*

*Vitrano Law Offices, PLLC, by Sean Paul Vitrano, for Defendant.*

INMAN, Judge.

Michael Eric Campbell (“Defendant”) appeals the trial court’s judgment entering a jury verdict convicting him of trafficking in methamphetamine. Because the evidence introduced at trial showed only that Defendant believed the white substance handed to him was fake, rather than an impure mixture of methamphetamine, and because the issue of Defendant’s knowing possession of the drug is controlled by this Court’s prior decisions, we reverse the trial court’s judgment.

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**I. Factual and Procedural Background**

Evidence presented by the State at trial showed the following:

On 12 June 2014, the Cleveland County Sheriff's Office, in coordination with the Drug Enforcement Administration, and with the assistance of an informant, arranged a controlled sale of methamphetamine at a local motel. Defendant had purchased methamphetamine from the informant, Greg Blackburn ("Blackburn"), on prior occasions, and he owed Blackburn approximately \$2,000.00.

Defendant arrived at the motel with Donnie Brown ("Brown"). They entered a motel room and Defendant sat on a bed next to Blackburn. Blackburn handed Defendant a plastic container wrapped in black electrical tape, which contained approximately twenty-eight grams, or one ounce, of a white crystalline substance that Blackburn said was methamphetamine. Defendant opened the container, examined its contents, and said, "This is re-rock." The substance was, in fact, a mixture of one gram of methamphetamine and twenty-eight or twenty-nine grams of a cutting agent. Blackburn insisted to Defendant that the methamphetamine was real. Brown asked to examine it, and Defendant then handed the container to Brown. Law enforcement officers entered the room and arrested Defendant and Brown.

An officer read Defendant his Miranda rights and Defendant then agreed to speak with law enforcement. According to Defendant, he began helping Blackburn distribute methamphetamine three months earlier, in March 2014. Defendant said that he had purchased quarter-ounce quantities of methamphetamine from Blackburn on four separate occasions, that he had previously sold to another individual, and that he would set up a controlled transaction to sell additional methamphetamine to that individual.

At the close of the State's evidence, Defendant moved to dismiss the case, arguing that the evidence showed he "did not know [the substance in the container] was methamphetamine" and, therefore, "did not knowingly possess methamphetamine." Defendant's motion was denied by the trial court.

Defendant presented no evidence. The jury found Defendant guilty of trafficking in methamphetamine. The trial court sentenced him to 70 to 93 months in prison and ordered him to pay a \$50,000.00 fine. Defendant timely appeals.

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**II. Analysis**

Defendant argues that the trial court erred when it denied his motion to dismiss for insufficiency of the evidence.<sup>1</sup> After careful review, we agree.

**A. *Standard of Review***

We review the trial court's denial of a motion to dismiss *de novo*. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). "To survive a motion to dismiss for insufficient evidence, the State must present substantial evidence of all the material elements of the offense charged and that the defendant was the perpetrator of the offense." *State v. Campbell*, 368 N.C. 83, 87, 772 S.E.2d 440, 444 (2015) (citation and quotation marks omitted). "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Herring*, 322 N.C. 733, 738, 370 S.E.2d 363, 367 (1988). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

**B. *Knowing Possession of a Controlled Substance***

Defendant was convicted of trafficking in methamphetamine in violation of N.C. Gen. Stat. § 90-95(h)(3b), which provides: "Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine or any mixture containing such substance shall be guilty of a felony[.]" N.C. Gen. Stat. § 90-95(h)(3b) (2013). To obtain a conviction under section 90-95(h)(3b), "the State must prove the defendant (1) knowingly possessed or transported methamphetamine, and (2) that the amount possessed was greater than 28 grams." *State v. Shelman*, 159 N.C. App. 300, 305, 584 S.E.2d 88, 93 (2003) (citations omitted). In this case, the State's evidence did not show that Defendant knowingly possessed methamphetamine.

The evidence discloses that Defendant and Brown met with Blackburn, a police informant, at a motel to purchase methamphetamine. Brown testified at trial that Blackburn handed the closed container to Defendant, who opened it and said, "This is re-rock. . . . [T]hat's fake meth." Blackburn's girlfriend, Lindsey Cochran ("Cochran"),

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1. Defendant also argues that the trial court committed plain error in admitting hearsay evidence. Because we agree with Defendant that the trial court erred in denying his motion to dismiss, we do not reach the second argument.



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who was also in the motel room, testified that Defendant “looked at [the contents of the container] and he was, like, This is re-rock. It’s fake. . . . He said it was fake.”

Deputy Matthew Sadler (“Deputy Sadler”), one of the sheriff’s deputies listening in on the transaction, testified that “when the canister was passed from Blackburn to [Defendant], he said – he opened it and said, ‘This is fake.’ He said, [‘]This is fake or it’s flex.’ And then he handed it to Donnie Brown. . . . [I]t was identified as flex and then handed off to Mr. Brown.” Brown asked to inspect the contraband because he had never seen “re-rock” before and wanted to know what it looked like. Brown opened the container and looked at its contents; the moment he did so, Deputy Sadler entered the room and arrested Defendant and Brown.

Every witness for the State testified that Defendant used the term “re-rock” to describe “fake” drugs.<sup>2</sup> When asked directly what “re-rock” is, Brown testified:

At the time I had no idea what it was. They said that’s fake meth. I said, “Let me see it.” [Defendant] handed it to me. I opened it and looked at it. As soon as I looked at it, Mr. Sadler come [sic] walking through the door.

. . . .

It just looked a little milky. Regular meth is a little clearer, like glass, and this had a milky color to it.

The prosecutor also asked Cochran if she knew what “re-rock” was, and she testified “[n]ot really” before confirming that Defendant said “it was fake[.]” No other witnesses testified what “re-rock” meant, leaving the jury with a singular definition: fake methamphetamine.

Our dissenting colleague asserts that “re-rock” in the particular vernacular of the illicit drug trade means some form of diluted, impure, or watered-down controlled substance. But no evidence introduced at trial informed the jury of that possible meaning, or any meaning other than a fake substance.

The dissent asserts we are intruding upon the jury’s duty to weigh the evidence because we “do[ ] not understand what the terms ‘re-rock’ or ‘flex’ mean.” The question is not whether this Court understands these terms, but whether a juror could draw a reasonable inference

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2. Although Deputy Sadler testified that Defendant said, “This is fake. . . . This is fake or it’s *flex*[.]” (emphasis added), no definition of the term “flex” was ever provided to the jury.

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from the evidence presented by the State consistent with the meaning proposed by the dissent. The State could have offered such evidence. See, e.g., *State v. McClaude*, 237 N.C. App. 350, 356, 765 S.E.2d 104, 109 (2014) (upholding the trial court's denial of a motion to dismiss a charge of cocaine possession when a sheriff's deputy testified, based on his training and experience, about the meaning of slang terms used by the defendant in describing drug transactions). It did not, and instead demonstrated only that Defendant considered the substance to be fake.<sup>3</sup>

Because the evidence showed Defendant believed he was handed fake methamphetamine, his inspection and handling of the substance, in accord with prior decisions by this Court, does not amount to knowing possession. See *State v. Wheeler*, 138 N.C. App. 163, 530 S.E.2d 311 (2000); *State v. Moose*, 101 N.C. App. 59, 398 S.E.2d 898 (1990).

In *State v. Wheeler*, during a controlled sale, an undercover officer handed the defendant cocaine, which the defendant in turn handed to his accomplice. *Wheeler*, 138 N.C. App. at 164, 530 S.E.2d at 312. The accomplice tasted the substance and handed it back to the undercover officer, expressed concerns with the quality of the drug, and told the officer he and the defendant did not want to complete the purchase. *Id.* This Court concluded the State did not present substantial evidence of possession, much less knowing possession, because the defendant and his accomplice "handled the cocaine for the sole purpose of inspecting it and after inspection they made a determination not to purchase the cocaine." *Id.* at 165, 530 S.E.2d at 313. This Court ultimately held that the defendant's "handling of the cocaine for inspection purposes does not constitute possession within the meaning of section 90-95(h)(3), as he did not have the power and intent to control its disposition or use." *Id.* (citing *Moose*, 101 N.C. App. at 65, 398 S.E.2d at 901, and *United States v. Kitchen*, 57 F.3d 516, 524–25 (7th Cir. 1995)).

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3. The dissent posits that our analysis also requires casting a skeptical eye to the word "fake," suggesting it is an equally obscure term with a meaning specific in the drug trade. Unlike the term "re-rock," "fake" has been commonly used in the English language since the 1800s. See *Black's Law Dictionary* (11th ed. 2019) (defining "fake," dating to the 19th century, as "[s]omething that is not what it purports to be.") The word "fake" has been used in hundreds of this State's appellate court decisions for more than a century for the same common meaning in a wide array of cases involving, by way of example, fake drugs, fake identification, fake name, and fake alibi. By contrast, the word "re-rock," appears in no prior decision by this Court or our Supreme Court. The word "flex," as used in the context of the cocaine trade, has been used by this Court in just one decision, in which a police officer testified that it meant "fake crack cocaine." *State v. Massey*, 153 N.C. App. 324, 569 S.E.2d 736, 2002 WL 31163605, at \*1 (2002) (unpublished). The Court in *Massey* did not define the word "fake."

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We conclude that *Wheeler* is controlling in this case. As in *Wheeler*, the State's evidence showed only that Defendant identified the substance as "re-rock" and "fake," and no evidence supports a reasonable inference that Defendant intended to continue the transaction after telling Blackburn he believed it was fake. To be sure, the evidence shows that Defendant came to the motel intending to purchase real—not fake—methamphetamine. And the State's evidence tended to show that Blackburn actually handed Defendant a mixture containing methamphetamine. Nonetheless, Defendant's identification of the substance as fake does not evince the requisite intent to control the disposition or use of a controlled substance. *Wheeler*, 138 N.C. App. at 165, 530 S.E.2d at 313 (citations omitted). Though Defendant handed the contraband to Brown after identifying it as fake, Brown's testimony shows that Defendant did so simply because Brown wanted to know what fake methamphetamine looked like rather than to continue the purchase. This Court has held that handling a drug solely for inspection purposes, standing alone, does not constitute possession. *See Moose*, 101 N.C. App. at 65, 398 S.E.2d at 901 (holding an informant did not possess cocaine for trafficking purposes when the informant inspected it by placing a finger into the white powder and touching it to the informant's lip); *see also Kitchen*, 57 F.3d at 524 (holding a defendant did not possess cocaine during a planned purchase when he picked it up to inspect it, expressed doubt as to its purity, and was arrested before he could expressly call off the transaction).

**III. Conclusion**

We hold that the trial court erred in denying Defendant's motion to dismiss because the State failed to present substantial evidence that Defendant possessed, much less knowingly possessed, the methamphetamine within the container. The trial court's judgment is reversed.

REVERSED.

Chief Judge McGEE concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting in separate opinion.

The majority opinion is at odds with the fundamental principle that "[t]he jury's role is to weigh evidence, assess witness credibility, assign probative value to the evidence and testimony, and determine what the

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evidence proves or fails to prove.” *State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012) (citations omitted). It is further at odds with the idea that “[i]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury.” *State v. Yisrael*, 255 N.C. App. 184, 193, 804 S.E.2d 742, 747 (2017) (*purgandum*).

Here, twelve men and women from Cleveland County weighed and deliberated over the evidence presented, and they unanimously found Defendant guilty of trafficking in methamphetamine. Because the majority reweighs the evidence and renders a different verdict, I respectfully dissent.

Review of a trial court’s denial of a Defendant’s motion to dismiss is *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citing *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982)). “If there is more than a scintilla of competent evidence to support the allegations in the warrant or indictment, it is the court’s duty to submit the case to the jury.” *State v. Horner*, 248 N.C. 342, 344-45, 103 S.E.2d 694, 696 (1958) (citations omitted).<sup>1</sup> “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

The trial court’s function is to determine whether the evidence will permit a reasonable inference that the defendant is guilty of the crimes charged. In so doing the trial court should only be concerned that the evidence is sufficient to get the case to the jury; it should not be concerned with the weight of the evidence. It is not the rule in this jurisdiction that the trial court is required to determine that the evidence excludes every reasonable hypothesis of innocence before denying a defendant’s motion to dismiss.

*State v. Vause*, 328 N.C. 231, 237, 400 S.E.2d 57, 61 (1991) (*purgandum*).

Pursuant to N.C. Gen. Stat. Section 90-95,

Any person who sells, manufactures, delivers, transports,  
or possesses 28 grams or more of methamphetamine or

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1. “The terms ‘more than a scintilla of evidence’ and ‘substantial evidence’ are in reality the same and simply mean that the evidence must be existing and real, not just seeming or imaginary.” *State v. Earnhardt*, 307 N.C. 62, 66, 296 S.E.2d 649, 652 (1982) (citation omitted).

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any mixture containing such substance shall be guilty of a felony which felony shall be known as “trafficking in methamphetamine” and if the quantity of such substance or mixture involved:

- a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 93 months in the State’s prison and shall be fined not less than fifty thousand dollars (\$50,000)[.]

N.C. Gen. Stat. § 90-95(h)(3b)(a) (2019).

A defendant may be found guilty of trafficking in methamphetamine by possession if the State satisfies a two-prong test beyond a reasonable doubt. *State v. Cardenas*, 169 N.C. App. 404, 409, 610 S.E.2d 240, 243-44 (2005). First, the State must show that the defendant knowingly possessed methamphetamine. *Id.* at 409, 610 S.E.2d at 243. To satisfy the knowledge requirement, a “defendant must be aware of the presence of [the] illegal drug.” *State v. Weldon*, 314 N.C. 401, 403, 333 S.E.2d 701, 702-03 (1985). Second, the State must show “that the amount possessed [by the defendant] was 28 grams or more.” *Cardenas*, 169 N.C. App. at 409, 610 S.E.2d at 243-44 (citation omitted).

Here, the State presented more than a scintilla of evidence that Defendant knowingly possessed more than 28 grams of a mixture of methamphetamine. The evidence tended to show that Defendant was a methamphetamine dealer who obtained his supply twice a week from Blackburn. Blackburn occasionally fronted quantities of methamphetamine to Defendant upon Defendant’s promise to repay. On this occasion, Defendant was meeting Blackburn to acquire an ounce of methamphetamine. Brown testified that Defendant “was going to give me a bag of free meth for giving him a ride.”

Once Defendant arrived at the pre-determined location for the transaction, Defendant asked where the illegal contraband was located. Blackburn “handed [Defendant] the container” wrapped in black electrical tape. At this point, the evidence tended to show that Defendant had a mixture of more than 28 grams of methamphetamine in his possession.

Additionally, evidence was presented that upon opening the container, Defendant stated that the mixture of methamphetamine was “re-rock.” Testimony was also presented that Defendant said the mixture of methamphetamine was “flex” or “fake.” After Defendant made

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these comments, Blackburn reassured Defendant that the methamphetamine was good. Defendant handed the mixture of methamphetamine to Brown.

“Re-rock” is a term used in the illicit drug trade, typically associated with repackaging cocaine, to describe a watered-down product packaged in such a way to make it appear pure. This statement by Defendant is some evidence of Defendant’s knowledge, and this evidence, in the light most favorable to the State, was properly submitted to the jury on the issue of knowing possession. The majority states that because it does not understand what the terms “re-rock” or “flex” mean, those terms have no evidentiary value. To be consistent, the majority should also include the term “fake,” as that term was never defined in the context in which Defendant used it.

However, the question of whether Defendant knowingly possessed methamphetamine when he uttered “fake,” “re-rock,” or “flex” should turn on what Defendant meant when he uttered those terms, not the majority’s knowledge. All three terms may have meant impure methamphetamine, or they could have all meant counterfeit drugs. Or, it may have been an attempt by Defendant to renegotiate the deal because of the quality of the methamphetamine. Whatever Defendant meant when he uttered those terms, it is the “province of the jury to weigh the testimony and to decide upon its adequacy to prove any issuable fact.” *State v. Owenby*, 226 N.C. 521, 523, 39 S.E.2d 378, 379 (1946). It is not the duty of this Court to assign evidentiary value and reweigh the evidence.

As in most cases, jury selection here was not recorded. We have no idea of who sat on the jury that heard Defendant’s case. We do not know anything about the jurors’ backgrounds. Perhaps this jury had members with prior experience in law enforcement or the drug trade. This jury could have consisted of twelve former law enforcement officers, twelve former drug dealers, or twelve former prosecutors. One juror may have understood exactly what “re-rock” or “flex” meant in this context and explained those terms to fellow jurors. Whatever the make-up of the jury, it was their duty to listen to the evidence and determine if they were fully satisfied or entirely convinced of Defendant’s guilt using their reason and common sense.

Further, the majority contends Defendant did not possess methamphetamine because inspection of illegal contraband does not constitute possession under *State v. Wheeler*, 138 N.C. App. 163, 165, 530 S.E.2d 311, 313 (2000). However, *Wheeler* is readily distinguishable. In *Wheeler*, the defendant received cocaine from an undercover officer

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and then the defendant handed the contraband to his accomplice. *Id.* at 164, 530 S.E.2d at 312. The accomplice tested the product and handed it back to the undercover officer. *Id.* at 164, 530 S.E.2d at 312. The defendant's accomplice said they did not want to continue with the purchase because of the poor quality of the cocaine. *Id.* at 164, 530 S.E.2d at 312. This Court concluded that under those circumstances, the State did not prove possession because the defendant and his accomplice "handled the cocaine for the sole purpose of inspecting it *and* after inspection they made a determination not to purchase the cocaine." *Id.* at 165, 530 S.E.2d at 312-13 (emphasis added).

Unlike *Wheeler*, Defendant did not affirmatively reject the methamphetamine mixture. At no time did Defendant return the container to Blackburn, attempt to become dispossessed of the methamphetamine once it was in his control, or otherwise indicate his intent to discontinue the transaction after Blackburn assured Defendant it was not "re-rock" (or "flex" or "fake"). Rather, Defendant handed the methamphetamine over to Brown. Brown never stated that they would not continue with the transaction, and Brown did not return the methamphetamine mixture to Blackburn. For these reasons, the trial court did not err, and Defendant's motion to dismiss was properly denied.

In addition, although the majority does not reach Defendant's plain error and Confrontation Clause arguments because of the disposition on his first argument, I would conclude that the trial court did not commit plain error when it admitted the challenged evidence, and did not violate Defendant's rights under the Sixth Amendment.

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[271 N.C. App. 766 (2020)]

STATE OF NORTH CAROLINA

v.

BOBBY M. CANADY, JR.

No. COA20-19

Filed 2 June 2020

**Sentencing—sale or delivery of cocaine—conviction of both sale and delivery arising from same transaction—arrested judgment on lesser offense**

Where defendant was charged with the sale or delivery of cocaine under N.C.G.S. § 90-95 and the jury returned guilty verdicts for both sale and delivery arising from the same transfer, the trial court did not commit plain error by sentencing defendant for the greater offense of sale of cocaine after arresting judgment on the conviction of delivery of cocaine.

Appeal by defendant from judgment entered 13 September 2019 by Judge Ronald L. Stephens in Onslow County Superior Court. Heard in the Court of Appeals 13 May 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General David D. Lennon, for the State.*

*The Epstein Law Firm, by Drew Nelson, for defendant.*

ARROWOOD, Judge.

Bobby M. Canady, Jr. (“defendant”) appeals from judgment entered upon his convictions for sale of cocaine, delivery of cocaine, conspiracy to sell or deliver cocaine, and possession of cocaine with intent to sell or deliver. He contends the trial court erred or plainly erred during sentencing by improperly applying N.C. Gen. Stat. § 90-95 and sentencing him for a class G felony rather than a class H felony. For the following reasons, we find no plain error.

**I. Background**

On 8 May 2018, defendant was indicted by a grand jury on charges of felony delivery of cocaine, felony conspiracy to sell or deliver cocaine, felony possession with intent to manufacture, sell, or deliver cocaine, felony manufacture of cocaine, felony sale of cocaine, and misdemeanor possession of drug paraphernalia. On 4 June 2019, a



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grand jury returned an ancillary indictment of defendant as a habitual felon. On 10 September 2019, the State dismissed the charges of manufacture of cocaine and possession of drug paraphernalia, and defendant was tried before a jury on the remaining charges.

On 12 September 2019, the jury found defendant guilty of delivery of cocaine, conspiring to sell or deliver cocaine, possession with intent to sell and deliver cocaine, and sale of cocaine. During the charge conference, defense counsel raised no objection to the proposed jury instructions or verdict sheet. Defendant pleaded guilty to the status of habitual felon. At sentencing, the trial court arrested judgment on the conviction of delivering cocaine and consolidated the remaining three convictions into the single count of selling cocaine. Sale of cocaine is a class G felony, and was enhanced to a class C felony due to defendant's habitual felon status. The trial court thus sentenced defendant to 96 to 128 months' imprisonment and ordered defendant to undergo a substance abuse assessment and treatment. Defendant gave oral notice of appeal in open court.

## II. Discussion

Defendant's sole contention on appeal is that the trial court committed error or, in the alternative, plain error by improperly applying N.C. Gen. Stat. § 90-95 and sentencing him for a class G felony rather than a class H felony. Specifically, defendant argues that the trial court failed to sentence him based on the "sale or delivery" of cocaine and that the language of N.C. Gen. Stat. § 90-95 is ambiguous as to what punishment is required for such a conviction. We disagree.

At trial, defense counsel raised no objection to either the verdict sheet or the jury instructions. In addition, defense counsel moved to arrest judgment on defendant's conviction for delivery of cocaine, but not the sale of cocaine. On appeal, defendant now challenges the trial court's sentencing of him on the sale of cocaine charge rather than the "sale or delivery" of cocaine, despite failing to raise this issue at trial. This court reviews unpreserved issues on appeal for plain error.

[T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where [the error] is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to

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appellant of a fair trial or where the error is such as to seriously affect the fairness, integrity or public reputation of judicial proceedings or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

*State v. Lawrence*, 365 N.C. 506, 516-17, 723 S.E.2d 326, 333 (2012) (emphasis in original) (internal citations and quotation marks omitted) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

N.C. Gen. Stat. § 90-95(a)(1) makes it unlawful to “manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance.” N.C. Gen. Stat. § 90-95(a)(1) (2019). The statute further provides that, generally, “any person who violates [the statute] with respect to: (1) [a] controlled substance classified in Schedule I or II shall be punished as a Class H felon” except that “the sale of a controlled substance classified in Schedule I or II shall be punished as a Class G felony[.]” N.C. Gen. Stat. § 90-95(b)(1). In *State v. Moore*, our Supreme Court interpreted the statute to mean that “a defendant may not . . . be convicted under N.C. [Gen. Stat.] § 90-95(a)(1) of both the sale *and* the delivery of a controlled substance arising from a single transfer.” 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990) (emphasis in original). There, the defendant faced two indictments for two separate drug transactions, each charging him with possession of a controlled substance with intent to sell or deliver, sale of a controlled substance, and delivery of a controlled substance. *Id.* at 379-80, 395 S.E.2d at 125. The defendant was subsequently convicted of all three counts charged, with the trial court treating the sale count and delivery count as separate offenses. *Id.* at 380, 395 S.E.2d at 125-26. The trial court consolidated the counts in each indictment for purposes of judgment and entered two judgments. *Id.* at 380, 395 S.E.2d at 126.

Our Supreme Court held that while a defendant may be indicted and tried under N.C. Gen. Stat. § 90-95(a)(1) for both the sale and delivery of a controlled substance, they may not be convicted of both if they arose from a single transfer. *Id.* at 382, 395 S.E.2d at 127. Instead, in rendering its verdict, the relevant determination for the jury is only “whether the defendant is guilty or not guilty of transferring a controlled substance to another person.” *Moore*, 327 N.C. at 383, 395 S.E.2d at 127. The *Moore* court thus held that the jury was improperly allowed to convict the defendant of both the sale and delivery of a controlled substance arising from a single transfer. *Id.* It further remanded the case for sentencing because the three convictions had been consolidated into one judgment, leaving the Court “unable to determine what weight, if any,

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the trial court gave each of the separate convictions for sale and for delivery in calculating the sentences imposed upon the defendant.” *Id.* at 383, 395 S.E.2d at 127-28.

Defendant contends that, based on *Moore*, he should have been sentenced based on the transfer of a controlled substance by “sale or delivery,” and that the trial court erred by not doing so. Furthermore, defendant argues that while N.C. Gen. Stat. § 90-95 makes clear that selling cocaine should be punished as a class G felony and delivering cocaine punished as a class H felony, it is unclear as to what the appropriate punishment is for judgment based on the “sale or delivery” of cocaine. Defendant argues the statute is thus ambiguous because if a jury returns a verdict that a defendant is guilty of “transferring a controlled substance to another person,” and it is not clear whether the defendant is guilty of transfer by sale or by delivery, or both, the trial court will not be able to determine the appropriate class of felony for sentencing purposes. Defendant contends that, in light of the ambiguity, this Court should apply the doctrine of lenity, which requires the strict construction of the statute in favor of the defendant. *State v. Maness*, 363 N.C. 261, 300, 677 S.E.2d 796, 820 (2009) (quoting *State v. Scoggin*, 236 N.C. 1, 10, 72 S.E.2d 97, 103 (1952)). In defendant’s view, because the delivery of cocaine carries a lesser punishment than the sale of cocaine, the trial court should have sentenced him based on delivering cocaine, a class H felony, rather than as a class G felony associated with selling cocaine. *See* N.C. Gen. Stat. § 90-95(b)(1). Accordingly, absent the trial court’s error, defendant would have received a lesser sentence and was therefore prejudiced. We are not persuaded by defendant’s argument.

The present case is distinguishable from *Moore* because, unlike the sentence of the defendant there, it is clear from the facts of this case how the trial court calculated the sentence it imposed on defendant. Here, though the jury convicted defendant of both selling and delivering cocaine, the trial court granted defendant’s motion to arrest judgment on the delivery of cocaine conviction.

A motion in arrest of judgment is proper when it is apparent that no judgment against the defendant could be lawfully entered because of some fatal error appearing in (1) the organization of the court, (2) the charge made against the defendant (the information, warrant or indictment), (3) the arraignment and plea, (4) the verdict, and (5) the judgment.

*State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 131-32 (1990) (internal citations omitted) (quoting *State v. McGaha*, 306 N.C. 699, 702, 295

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S.E.2d 449, 451 (1982)). “When judgment is arrested because of a fatal flaw which appears on the face of the record . . . the verdict itself is vacated and the state must seek a new indictment if it elects to proceed again against the defendant.” *Id.* at 439, 390 S.E.2d at 132. Here, the trial court arrested judgment on the delivery of cocaine conviction, consolidated the remaining convictions into a single count of sale of cocaine, and sentenced defendant accordingly. Thus, the purpose of *Moore*—to prevent a defendant from being doubly punished for transfer arising from the same transaction—was ultimately achieved and the problem addressed by the *Moore* court eliminated: defendant was in effect only convicted and sentenced based on the sale of cocaine, rather than both the sale and delivery of cocaine.

The dilemma described by defendant is thus not the situation we are faced with here, and we need not address it. However, we note that, even if it were, this Court previously noted in *State v. Anthony Moore*, No. COA19-301, 2020 WL 64900, \*2, n.1 (N.C. Ct. App. Jan. 7, 2020) that a trial judge’s decision concerning how to sentence a defendant based on a transfer by “sale or delivery” judgment will be based on certain critical facts proven at trial. Though our decision in *Anthony Moore* was unpublished, the same reasoning applies here. In addition, contrary to defendant’s assertion, there is no requirement that the trial court must choose to vacate the more severe conviction rather than the lesser. *See State v. Fleig*, 232 N.C. App. 647, 651, 754 S.E.2d 461, 464 (2014) (remanding for sentencing a judgment based on both the sale and delivery of marijuana in a single transaction, and instructing the trial court to either vacate the sale of marijuana conviction or delivery of marijuana conviction). Accordingly, defendant cannot establish the prejudice needed to show that plain error occurred below.

**III. Conclusion**

For the foregoing reasons, we find no plain error.

NO ERROR.

Judges DIETZ and TYSON concur.

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STATE OF NORTH CAROLINA

v.

NATHANAEL HIGH, DEFENDANT

No. COA19-1170

Filed 2 June 2020

**Sentencing—resentencing—prior record level—use of joinable offense—rescission of plea agreement**

Where defendant had originally been sentenced to life without parole after convictions of first-degree murder and armed robbery for offenses committed when he was 15, and—after defendant’s motion for appropriate relief—the conviction of first-degree murder was dismissed and defendant pleaded guilty to second-degree murder, the trial court erred in calculating defendant’s prior record level for sentencing—even though defendant stipulated to that level—by using the armed robbery conviction as a prior conviction since the robbery charge was joinable with the murder charge. Because the sentencing was pursuant to a plea agreement, the proper remedy was rescission of the plea agreement.

Appeal by Defendant from order entered 17 June 2019 by Judge David Phillips in Gaston County Superior Court. Heard in the Court of Appeals 28 April 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.*

*Arnold & Smith, PLLC, by Paul A. Tharp, for the Defendant.*

BROOK, Judge.

Nathanael High (“Defendant”), appeals from an order filed 17 June 2019 denying his Motion for Appropriate Relief (“MAR”) in which Defendant sought review of his 5 May 2014 sentencing. Because we conclude that the trial court erred in calculating Defendant’s prior record level, we reverse.

**I. Factual and Procedural Background**

The present appeal arises out of events that occurred when Defendant was 15 years old, in February of 2002. The State alleged that Defendant shot and killed his father and took money out of a

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coffee jar in his father's bedroom. Litigation related to a MAR filed by Defendant subsequent to his convictions revealed nine years' worth of North Carolina Department of Social Services ("DSS") records involving substantiated claims of neglect and abuse by Defendant's father against Defendant and Defendant's younger brother.

Defendant was first charged with one count of murder in the first degree in violation of N.C. Gen. Stat. § 14-17 and one count of robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87 on 10 February 2002, and a grand jury indicted Defendant on these charges on 1 April 2002. A Gaston County jury found Defendant guilty of both charges on 24 May 2004. Defendant was sentenced to life in prison without the possibility of parole for murder and to 64 to 86 months for robbery, the sentences to run concurrently. Defendant appealed, resulting in this Court's opinion issued on 15 November 2005, finding no error in the trial court proceedings. *State v. High*, 174 N.C. App. 627, 621 S.E.2d 342, 2005 WL 3046444 (2005) (unpublished).

Defendant filed a MAR on 24 June 2013 in Gaston County Superior Court. His MAR was heard on 5 May 2014, Judge Jesse V. Caldwell presiding. Pursuant to a plea agreement with the State, the trial court entered an order vacating Defendant's first-degree murder conviction and sentence, and Defendant pleaded guilty to second-degree murder. Defendant and the State agreed to a sentence of 236 to 293 months for second-degree murder upon expiration of the 64- to 84-month active sentence for robbery, and the trial court sentenced Defendant to the same. The section of the plea agreement, form AOC-CR-300, entitled "Plea Arrangement," states: "The State will dismiss the charge of first-degree murder. Mr. High will plead guilty to second-degree murder. The State and Mr. High agree to a sentence of 236-293 months to run consecutively to RWDW [robbery with a dangerous weapon] sentence[.]" As part of the plea agreement, the State submitted form AOC-CR-600A, a prior record level worksheet, which listed one prior Class B2, C, or D felony conviction, amounting to six prior record points. Six points resulted in a prior record level of III. Section IV of the form, entitled "Prior Conviction," listed Defendant's robbery with a dangerous weapon conviction, a Class D felony, with date of conviction 24 May 2004. Defense counsel signed section II, entitled "Stipulation," agreeing with Defendant's prior record level as set out in the form.

Defendant filed a second MAR on 25 January 2019 in Gaston County Superior Court, seeking review of his 5 May 2014 sentencing. At the hearing on Defendant's MAR on 17 June 2019, Judge David Phillips denied Defendant's MAR. Defendant filed a petition for writ of certiorari

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to our Court on 30 August 2019. We first denied Defendant's petition on 16 September 2019. However, we then issued an amended order allowing Defendant's petition in part and limiting review to whether the trial court erred in calculating Defendant's prior record level. On 7 October 2019, Defendant's appeal was deemed taken after his counsel entered an appearance.

**II. Jurisdiction**

Defendant petitioned this Court for a writ of certiorari on 25 August 2019, which this Court granted in part on 16 September 2019 to review whether the trial court erred in calculating Defendant's prior record level. Amended Order, *State v. High* (COA19-1170) (2019). Though Defendant petitioned this Court for a writ of certiorari to review several alleged errors at the trial court, our review, pursuant to the writ, is limited to the calculation of Defendant's prior record level.

**III. Standard of Review**

The determination of a defendant's prior record level for sentencing purposes is subject to de novo review. *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009). "Under a *de novo* review, th[is] Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted).

**IV. Analysis**

Defendant contends that the trial court improperly sentenced him as a Level III offender and that he should have been sentenced as a Level I offender instead. Defendant contends that the trial court erred in using his robbery conviction as a prior conviction when calculating his prior record level because the robbery conviction was joinable with the second-degree murder charge to which he pleaded guilty. In support of his argument, Defendant cites *State v. West*, in which our Court held "that the assessment of a defendant's prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly." 180 N.C. App. 664, 669, 638 S.E.2d 508, 512 (2006). We agree that the trial court erred in calculating Defendant's prior record level in this case.<sup>1</sup>

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1. Defendant further argues that the trial court erred in considering in aggravation that Defendant "took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense[.]" and that Defendant's first-degree murder sentence had been reduced to second-degree murder. However, certiorari was expressly limited to review whether the trial court erred in calculating Defendant's prior record level. We therefore do not reach Defendant's arguments regarding aggravating factors.



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“Before imposing a sentence, the court shall determine the prior record level for the offender pursuant to G.S. 15A-1340.14.” N.C. Gen. Stat. § 15A-1340.13(b) (2019). While the State bears the burden of proving a defendant’s prior record level, that burden can be met, *inter alia*, by stipulation of the parties. *Id.* § 15A-1340.14(f)(1). Our Courts have held that defendants can stipulate to their prior convictions in a number of ways. Most relevant to this case, defense counsel’s signature in section III, entitled “Stipulation,” on the plea agreement manifests a defendant’s stipulation to his or her prior convictions and prior record level as laid out therein. *State v. Spencer*, 187 N.C. App. 605, 613, 654 S.E.2d 69, 74 (2007).

However, a defendant’s stipulation does not end the inquiry into his or her prior record level. “Once a defendant makes this stipulation, the trial court then makes a legal determination by reviewing the proper classification of an offense so as to calculate the points assigned to that prior offense.” *State v. Arrington*, 371 N.C. 518, 524, 819 S.E.2d 329, 333 (2018). While a defendant may properly stipulate to the existence of a prior conviction and to its classification (e.g., as a Class C or D felony), *see id.* at 527, 819 S.E.2d at 335, “a defendant is not bound by a stipulation as to any conclusion of law that is required to be made for the purpose of calculating th[e prior record] level[.]” *State v. Gardner*, 225 N.C. App. 161, 167, 736 S.E.2d 826, 830 (2013); *accord State v. Massey*, 195 N.C. App. 423, 429, 672 S.E.2d 696, 699 (2009) (“[D]efendant stipulated to the accuracy of the prior conviction worksheet. Although this stipulation does not preclude our *de novo* appellate review of the trial court’s calculation of defendant’s prior record level, it is sufficient to satisfy the State’s evidentiary burden of proof of this conviction.”).

Where the calculation of a defendant’s prior record level requires answering a legal question, a stipulation to the prior record level does not prevent our review. *Gardner*, 225 N.C. App. at 168, 736 S.E.2d at 831. For example, in *Gardner*, the defendant stipulated to her prior record level by signing the stipulation on the sentencing worksheet as part of her plea agreement. *Id.* at 166, 736 S.E.2d at 830. On appeal, she argued that one point was improperly added to her prior conviction level pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(6), “which provides that one point is added ‘[i]f all the elements of the present offense are included in any prior offense for which the offender was convicted[.]’ ” *Id.* at 167, 736 S.E.2d at 831 (quoting N.C. Gen. Stat. § 15A-1340.14(b)(6) (2011)). Our Court reversed and remanded for resentencing because, although the defendant had stipulated to her prior record level, the trial court erred by misapplying the relevant statute and assigning her an extra prior record level point. *Id.* at 170, 736 S.E.2d at 832. Similarly, our



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Court in *State v. Hanton* held that the determination of whether the elements of an out-of-state criminal offense were substantially similar to the elements of a North Carolina criminal offense “does not require the resolution of disputed facts.” 175 N.C. App. 250, 254, 623 S.E.2d 600, 604 (2006) (citation omitted). Rather, we held that such a determination “involves statutory interpretation, which is a question of law.” *Id.* at 255, 623 S.E.2d at 604. As a question of law, a stipulation of substantial similarity is not binding upon the trial or appellate courts. *See State v. Prevette*, 39 N.C. App. 470, 472, 250 S.E.2d 682, 683 (1979) (“Stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts”).

Likewise, here, application of the *West* rule—whether a trial court improperly used a joinable offense in calculating a defendant’s prior record level—does not require the resolution of disputed facts but is instead a question of law. *See State v. Watlington*, 234 N.C. App. 601, 608-09, 759 S.E.2d 392, 396-97 (2014) (applying *West* to conclude that using a joined conviction in calculating a defendant’s prior record level where he was retried following a mistrial would violate N.C. Gen. Stat. § 15A-1340.14(d)). Defendant’s claim that his robbery with a dangerous weapon conviction was improperly used to calculate his record level is thus subject to our de novo review.

Here, Defendant’s prior record level was proven by stipulation. Defense counsel signed section III, entitled “Stipulation” on the same page of the plea agreement as his prior conviction:

The prosecutor and defense counsel . . . *stipulate* to the information set out in Sections I [“Scoring Prior Record/Felony Sentencing”] and IV [“Prior Conviction”] of this form, and *agree with the defendant’s prior record level* or prior conviction level as set out in Section II [“Classifying Prior Record/Conviction Level”] based on the information herein.

(Emphasis added.) Both the assistant district attorney and defense counsel signed the stipulation. This stipulation is sufficient to meet the State’s burden of proving the fact of Defendant’s prior convictions. *See Spencer*, 187 N.C. App. at 613, 654 S.E.2d at 74.

As explained above, however, the fact of Defendant’s stipulation does not resolve whether the trial court erred in calculating Defendant’s prior record level where, as here, Defendant argues that the trial court improperly considered a joinable offense in the calculation of his prior record level. We turn to whether Defendant’s conviction of

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armed robbery is a prior conviction as contemplated by N.C. Gen. Stat. § 15A-1340.11(7) and *West*.

“The prior record level of a felony offender is determined by calculating the sum of the points assigned to each of the offender’s prior convictions that the court . . . finds to have been proved in accordance with this section.” N.C. Gen. Stat. § 15A-1340.14(a) (2019). “A person has a prior conviction when, on the date a criminal judgment is entered, the person being sentenced has been previously convicted of a crime[.]” *Id.* § 15A-1340.11(7) (2019). While § 15A-1340.11(7) does not directly address the use of joined convictions as prior convictions, our Court has held “that the assessment of a defendant’s prior record level using joined convictions would be unjust and in contravention of the intent of the General Assembly.” *West*, 180 N.C. App. at 669-70, 638 S.E.2d at 512 (relying also on “the rule of lenity[, which] forbids a court to interpret a statute so as to increase the penalty that it places on an individual when the Legislature has not clearly stated such an intention.”) (citations omitted). Joinable offenses are defined in N.C. Gen. Stat. § 15A-926(a), which provides that “[t]wo or more offenses may be joined in one pleading or for trial when the offenses, whether felonies or misdemeanors or both, are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.” N.C. Gen. Stat. § 15A-926(a) (2019).

Our Court’s decision in *State v. Cooper*, 245 N.C. App. 567, 782 S.E.2d 581, 2016 WL 609213 (2016) (unpublished), provides useful illustration of the *West* rule. In that case, the defendant was charged with first-degree murder, attempted first-degree murder, and possession of a firearm by a felon, all based on the same underlying series of acts. *Id.* at \*1. The defendant pleaded guilty to possession of a firearm by a felon prior to jury selection and then proceeded to trial on the other two charges. *Id.* The trial court declared a mistrial when the jury was unable to reach a verdict on either charge and entered judgment on the charge of possession of a firearm by a felon. *Id.* After a retrial on the charges of first-degree murder and attempted first-degree murder, a jury found the defendant guilty of second-degree murder and not guilty of attempted first-degree murder. *Id.* at \*2. The trial court considered defendant’s conviction of possession of a firearm by a felon as a “prior” conviction in calculating the defendant’s prior record level. *Id.* Applying *West* and *Watlinton*, our Court concluded that those cases precluded the use of the defendant’s firearm possession conviction as a prior conviction because

had the first jury reached a verdict on the murder and attempted murder charges, any judgments entered

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thereupon would have been entered on any and all convictions arising from the joined charges at that time. None could have [been] used as a prior conviction for purposes of sentencing on any of the others.

*Id.* at \*3.

The logic of *West* and *Watlington* applies in the same fashion here. In this case, the State joined the charges of first-degree murder and robbery with a dangerous weapon. As in *Cooper*, “[n]one [of these offenses] could have [been] used as a prior conviction for purposes of sentencing on any of the others.” *Id.* While Defendant was serving his sentence, the United States Supreme Court ruled in *Miller v. Alabama* that mandatory life sentences without parole for juvenile offenders violate the United States Constitution. 567 U.S. 460, 470, 132 S. Ct. 2455, 2464, 183 L. Ed. 2d 407, 418 (2012). Based on *Miller*, the trial court dismissed the first-degree murder conviction against Defendant pursuant to Defendant’s plea agreement with the State. Applying our Court’s reasoning from *West* here, using Defendant’s robbery conviction as a prior conviction “would be [just as] unjust and in contravention of the intent of the General Assembly” upon Defendant’s plea to second-degree murder as it would have been had the State sought to use the robbery conviction as a “prior” conviction when Defendant was first sentenced on the joined charges in 2004. 180 N.C. App. at 669-70, 638 S.E.2d at 512.

As in *West* and *Watlington*, considering Defendant’s robbery conviction as a prior conviction in calculating Defendant’s prior record level amounted to a legal error requiring reversal.

## V. Remedy

Defendant requests “resentencing to correct the error of the trial court’s consideration of joined offenses[.]” The State argues that the remedy for an error in calculating Defendant’s prior record level here is rescission of the plea agreement. Precedent compels us to agree with the State.

Where a sentence is imposed in error as part of a plea agreement, the proper remedy is rescission of the entire plea agreement, and the parties must return to their respective positions prior to entering into the agreement and may choose to negotiate a new plea agreement. *See State v. Rico*, 218 N.C. App. 109, 122, 720 S.E.2d 801, 809 (2012) (Steelman, J., dissenting), *rev’d per curiam for reasons stated in dissent*, 366 N.C. 327, 734 S.E.2d 571 (2012). Here, the sentence was imposed as part of a plea arrangement; the State and Defendant agreed to a sentence of 236

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to 293 months to run consecutively to Defendant's sentence for robbery. Certain terms of Defendant's plea agreement with the State—namely the agreement to a sentence in accord with a prior record level of III—have been rendered unfulfillable, and we must rescind the plea agreement and return the parties to their respective positions prior to their entering into the plea agreement. *Compare State v. Braswell*, \_\_\_ N.C. App. \_\_\_, \_\_\_, 837 S.E.2d 580, 586 (2020) (remanding for resentencing, but not rescission of plea agreement, where the State fails to prove prior conviction level and defendant did not agree to a particular sentence), *with Rico*, 218 N.C. App. at 122, 720 S.E.2d at 809 (concluding that remanding and rescinding plea agreement where error at sentencing rendered certain terms of the agreement unfulfillable is the proper remedy).

## VI. Conclusion

We conclude that the trial court erred in calculating Defendant's prior record level when it considered a joinable offense as a prior conviction for sentencing purposes. As such, we must rescind Defendant's plea agreement.

REVERSED.

Judges BRYANT and YOUNG concur.

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STATE OF NORTH CAROLINA

v.

NADINE D. STUBBS, DEFENDANT

No. COA19-454

Filed 2 June 2020

**1. Crimes, Other—neglect of an elder adult by a caretaker—status as caretaker—sufficiency of evidence**

Where defendant was charged with neglect of an elder adult by a caretaker resulting in serious physical injury (N.C.G.S. § 14-32.3(b)) after her live-in, elderly mother was left bedridden for several weeks before being hospitalized and eventually dying, the trial court properly denied defendant's motion to dismiss the charge because there was sufficient evidence that defendant was her mother's "caretaker." Although defendant did not have a close relationship with her mother, the State's evidence showed that, in the mother's final weeks of life, defendant bathed her, bought food and supplies

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for her, assisted her in paying her bills, assumed daily care responsibilities over her, and purchased life insurance on her behalf.

**2. Evidence—neglect of an elder adult by a caretaker—recorded police interview—admissibility—plain error analysis**

Where defendant was charged with neglect of an elder adult by a caretaker resulting in serious physical injury (N.C.G.S. § 14-32.3(b)) after her live-in, elderly mother was left bedridden for several weeks before being hospitalized and eventually dying, the trial court did not commit plain error by allowing a video of the mother's interview with police to be played for the jury because defendant could not show she was prejudiced as a result. Although defendant argued that the video was the only evidence suggesting she was her mother's "caretaker," as defined in section 14-32.3(b), the record showed ample evidence apart from the video that adequately proved defendant's caretaker status.

Appeal by Defendant from order entered 26 October 2018 by Judge Imelda J. Pate in New Hanover County Superior Court. Heard in the Court of Appeals 5 February 2020.

*Attorney General Joshua H. Stein, by Assistant Attorney General A. Mercedes Restucha-Klem, for the State.*

*Appellate Defender Glenn Gerding, by Assistant Appellate Defender, James R. Grant, for defendant-appellant.*

MURPHY, Judge.

In 1995, our General Assembly enacted "An Act to Impose Criminal Penalties for the Abuse, Neglect, or Exploitation of Disabled or Elder Adults Living in a Domestic Setting." N.C.G.S. § 14-32.3 (2019) (enacted by 1995 S.L. Ch. 246, S.B. 127). In relevant part, this act holds individuals criminally liable if they fail to provide medical or hygienic care to an elder adult for whom they are a caretaker—either based on a familial relationship between the two or because that individual voluntarily undertook such responsibility—and the elder adult suffered serious injury as a result of the caretaker's act or failure to act. N.C.G.S. § 14-32.3(b), (d)(1) (2019).

Defendant Nadine Stubbs was charged with neglect of an elder adult after her live-in elderly mother was left bedridden for a period of weeks before being hospitalized and eventually dying. Defendant argues

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the trial court erred in denying her motion to dismiss for insufficient evidence that she was, in fact, her mother's caretaker as that word is defined by N.C.G.S. § 14-32.3(d)(1). Viewing the State's evidence under the appropriate standard of review, we disagree with Defendant's argument and hold the trial court did not err in denying her motion to dismiss. We likewise disagree with Defendant's other argument on appeal, that the trial court plainly erred in allowing a video of her mother to be played for the jury.

**BACKGROUND**

In 2013, Bernice Manning ("Manning") was brought to stay with her daughter, Defendant, in Wilmington. Defendant was not raised by Manning and did not meet her until she was 15 years old. Manning's daughter Pamela dropped her off for a purported three-week stay with Defendant but never returned; Manning continued living with Defendant for almost four years until her death in 2017.

**A. Manning's Medical Condition and Death**

In January 2017, New Hanover County Department of Social Services ("DSS") received an anonymous report of "caretaker neglect" in regard to Manning. DSS social worker Helen Freeman ("Freeman") visited Manning and Defendant's home on 20 January 2017 and was met at the door by Defendant's adult son, Charles, and teenaged daughter. Freeman noticed a "very, very strong odor . . . throughout the house" that intensified as she approached Manning's room. Outside Manning's door there were several sticks of incense—one still burning—placed in the doorjamb.

Although Defendant's house was "neat and clean," inside Manning's room Freeman was struck by an "[a]lmost intolerable" odor, which was so strong another social worker "had to leave the room because she couldn't tolerate [it]." That social worker described the room as smelling "like dead flesh." There was also "a tremendous amount of clutter, [about] knee-high, throughout the room." Manning was lying in bed, "wearing a fleece jacket that was unzipped, and she had no other clothes on except her socks." Manning's bed was soiled with feces and urine, and Manning herself "had urine and feces all over her . . . and it appeared that she had open wounds on her." When Freeman asked Manning how she was feeling, Manning said she was in pain and unable to walk or eat. Freeman "asked [Manning] if she wanted to go to the hospital" and Manning eventually agreed, at which time Freeman "immediately called EMS."

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At the hospital, Manning was admitted to the emergency room. The ER nurse testified Manning was “dehydrated, her skin was very dry, she was lethargic . . . not verbal, she was just moaning. Her vital signs were indicative of someone very sick. Her heart rate was very elevated, her blood pressure was very low.” Manning’s body was covered in so much feces and urine that it took the ER staff “[a]t least a half an hour” to clean her. Additionally, Manning’s limbs were contracted, meaning “both arms and both legs were bent inwards. [The ER staff] could not straighten them out.” This suggests weeks or months of “[i]mmobility, lack of use.” Manning was malnourished, suffering skin breakdown, and had several pressure ulcers that are caused by skin on skin contact for a period of days or weeks.

Given Manning’s condition when she was hospitalized, Freeman reported the incident to law enforcement the same day. Once she was cleaned and stabilized, Wilmington Police Detective Jeremy Barsaleau (“Barsaleau”) interviewed Manning for about 10 minutes in her hospital bed; the interview was captured on video and later played for the jury during Defendant’s trial. Barsaleau told Manning he was speaking with her to make sure everything was “ok at home” and to ensure she was being taken care of, and Manning said she would be fine if she could eat without being nauseous. Manning told Barsaleau, “I’m not being mistreated” and that, “I am being taken good care of.”

When she arrived at the hospital, Manning had “a long list of diagnoses,” including septic shock, severe acute respiratory distress syndrome, heart problems, acute kidney failure, cancer, and AIDS. After about two weeks in the hospital, Manning died of HIV infection and pneumonia.

**B. Investigation of Defendant**

Based on the complaint made to DSS and Manning’s condition when DSS responded, two investigations were launched: a civil investigation by DSS’s Adult Protective Unit, and a criminal investigation by the Wilmington Police Department. In the days and weeks following Manning’s hospitalization, both Wilmington police and DSS interviewed Defendant about her relationship with Manning and their living arrangement.

**1. The DSS Investigation**

In her DSS interview, Defendant thanked Freeman for helping her mother, but was unable to answer many of Freeman’s medical questions about Manning. For instance, she did not know the names of Manning’s doctors and was unaware of any medications Manning had been taking.



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Defendant told Freeman the two had not had any relationship to speak of before Manning came to live with her four years earlier. When asked if she helped Manning, Defendant told Freeman “she did the grocery shopping and did the other shopping for [Manning]. And she also helped her with her finances” by helping her pay her bills. Defendant also helped Manning “with bathing, . . . she would bathe her mother from the sink [because Manning] didn’t take baths in the tub, or she didn’t take showers[.]”

When Freeman asked how long Manning had been bedridden prior to her hospitalization, Defendant reported Manning “had been unable to get out of bed for several weeks, since New Year’s Eve.” Freeman’s “understanding from [Defendant] was that [Manning] was not able to walk for—for the entire month of January until I met her, so from the first through the 20th.” During that time, Manning had become unable to eat but Defendant was at least providing her “Ensure and Gatorade and water.” Defendant told Freeman she “had been trying to get [Manning] to go to the hospital, [but Manning] had been refusing.”

**2. The Police Investigation**

Across two police interviews, Defendant largely told law enforcement the same story she told DSS: Defendant explained how Manning came to live with her and described their relationship, which was not particularly close. Defendant said she had attempted to arrange medical care for Manning in the past, but Manning refused the care. When Manning needed help arranging things like Medicaid, food stamps, and social security, Defendant helped her do so—including transporting Manning to and from the relevant offices. Defendant told police she loved her mother, never mistreated her, and did her best to help her.

Defendant told police Manning was a very private person. In 2016, for instance, Manning had a DSS caseworker with whom Defendant had discussed getting “some kind of document” that would enable her to force Manning to go to the doctor. According to Defendant, Manning responded by threatening to sue the DSS worker if she told Defendant “anything . . . about my business[.]” Manning also kept a machete in her room which she would use to threaten unwanted visitors—including Defendant—who tried to enter her room.

Defendant’s description of Manning as a private, guarded person is consistent with the way other loved ones described her. For example, Manning’s sister Annie described her as “antisocial and standoffish,” and told police that, about a week before Manning was hospitalized, Defendant “told [Annie] that she was begging Manning to go to the



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hospital but Manning refused, told [Defendant] she would be okay.” Annie told police “Manning kept to herself and didn’t disclose her medical conditions[,]” and that she would “tell people to stay out of her business.” Police also spoke with one of Manning’s daughters, Gina, who “indicated that [Manning] was . . . prone to cussing people out.”

When discussing the weeks preceding Manning’s hospitalization, Defendant told police her adult son, Charles, told her she needed to call an ambulance for Manning “or if not, I’m fixing to do something about it right now.” At some point in early January, Defendant also helped Manning secure a life insurance policy in the amount of \$10,000.00. Manning’s policy was later voided because she had failed to disclose her HIV diagnosis to the insurer.

**C. Indictment and Trial**

The New Hanover County Grand Jury indicted Defendant on one count of neglect of an elder adult by a caretaker resulting in serious physical injury. During a jury trial in Superior Court, Defendant moved to dismiss the sole charge against her for insufficient evidence at the conclusion of the State’s case. Defendant argued the State failed to present “sufficient evidence of [Defendant] being [Manning’s] caretaker.” After giving both parties an opportunity to argue the motion and asking a number of questions, the trial court denied Defendant’s motion. Defendant did not put on any evidence, and the case was submitted to the jury, which convicted Defendant as charged. Defendant was sentenced to a mitigated-range sentence of 8 to 19 months imprisonment, suspended for 36 months of supervised probation with a special condition that she serve 60 days in the New Hanover County jail. Defendant gave timely notice of appeal.

**ANALYSIS****A. Motion to Dismiss**

[1] “When reviewing a sufficiency of the evidence claim, this Court considers whether the evidence, taken in the light most favorable to the [S]tate and allowing every reasonable inference to be drawn therefrom, constitutes substantial evidence of each element of the crime charged.” *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008). “In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

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Under N.C.G.S. § 14-32.3(b), the elements of neglect of an elder adult as that charge applied to Defendant are:

1. The Defendant is a “caretaker” of an “elder adult” who is residing in a domestic setting;
2. The Defendant wantonly, recklessly, or with gross carelessness fails to provide medical or hygienic care to the elder adult;
3. Such failure to act causes the elder adult to suffer an injury.

N.C.G.S. § 14-32.3(b) (2019). A “caretaker” is: “A person who has the responsibility for the care of a disabled or elder adult as a result of family relationship or who has assumed the responsibility for the care of a disabled or elder adult voluntarily or by contract.” *Id.* at (d)(1). That definition creates two paths to becoming a caretaker: (1) assuming responsibility for the care of an elderly person voluntarily or by contract; or (2) becoming responsible for the care of an elderly person as a result of a family relationship—a de facto caretaker relationship. Here, there is no evidence that Defendant entered into a contractual agreement to become Manning’s caretaker, so, to avoid dismissal, the State must have presented sufficient evidence that Defendant voluntarily assumed responsibility for Manning.

Defendant does not argue the State presented insufficient evidence that: (a) Manning was an “elder adult” as defined by the statute,<sup>1</sup> (b) she satisfied the *actus reus* and *mens rea* requirements of the statute—failing to provide care and doing so with gross carelessness; or (c) that Defendant’s actions caused Manning to suffer a serious injury. The only argument Defendant advanced either at trial or on appeal is that she does not fit the definition of a “caretaker” under the statute because she did not voluntarily undertake such a responsibility.

The caselaw addressing the elder neglect and abuse statute is sparse; only one North Carolina case has even cited N.C.G.S. § 14-32.3 since it was enacted in 1995, *State v. Forte*, 206 N.C. App. 699, 698 S.E.2d 745 (2010). In *Forte*, the defendant’s appeal was similar to this one. He argued the trial court erred in denying his motion to dismiss for insufficient evidence because the State failed to produce sufficient evidence

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1. An “elder adult” is defined as: “A person 60 years of age or older who is not able to provide for the social, medical, psychiatric, psychological, financial, or legal services necessary to safeguard the person’s rights and resources and to maintain the person’s physical and mental well-being.” N.C.G.S. § 14-32.3(d)(4) (2019).

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that he was a “caretaker” of the victim. *Id.* at 706, 698 S.E.2d at 750. There, the defendant and victim did not have a familial relationship, but the State offered evidence that the defendant had voluntarily become the victim’s caretaker by performing odd jobs, running errands, and writing checks for the victim; taking him to buy a headstone and dentures, helping him renovate his home, and cutting his toenails “on at least one occasion.” *Id.* Although there was no evidence Defendant had ever “provide[d] any personal care for [the victim], [the victim] and [d]efendant had a close relationship and [d]efendant was around [the victim’s] home with increasing frequency.” *Id.* We held:

Defendant argues that these “limited activities” are not sufficient to transform the “friendly relationship” between him and [the victim] into that of caretaker and charge. We disagree. We conclude the evidence was sufficient to allow the jury to find that Defendant had “assumed the responsibility for the care” of [the victim].

*Id.*

Defendant argues that, unlike the defendant and victim in *Forte*, she and Manning did not have a “close relationship.” Although Manning was Defendant’s mother, it is true that the two were not as close as the defendant and victim in *Forte*. Defendant did not meet Manning until she was 15 years old, and was not raised by Manning. Those close to Manning described her as “a very private person [who] liked to keep to herself[.]” Defendant described their relationship as “more like roommates.” Nevertheless, the State presented evidence that, in Manning’s final weeks, Defendant: bathed her mother or at least “helped her bathe from the sink”; purchased food and supplies for Manning; assisted Manning in paying her bills; helped with “general normal care, daily care things”; and purchased life insurance on Manning’s behalf and at her request. Based on the statutory definition of “caretaker” and our decision in *Forte*, this evidence is sufficient to send the question of Defendant’s caretaker status to a jury. The trial court did not err in denying Defendant’s motion to dismiss for insufficient evidence.

**B. Admission of Manning’s Police Interview**

[2] Defendant’s second argument on appeal is that the trial court committed plain error in allowing a video of Manning’s interview with police to be played for the jury at trial. Defendant argues that Manning’s statements in the video are hearsay, and that “[a]bsent [Manning’s] statements [in the video], there would have been

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no evidence at all suggesting [Defendant] was Manning's caretaker, and the trial court would have granted the defense's motion to dismiss."

There was no objection to the entrance of this video at trial, and we "apply the plain error standard of review to unpreserved . . . evidentiary errors in criminal cases." *State v. Maddux*, 371 N.C. 558, 564, 819 S.E.2d 367, 371 (2018).

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice – that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

*State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, alterations, and quotation marks omitted).

Even if the trial court did err in admitting Manning's interview with police, we cannot conclude the error was prejudicial. Defendant's argument as to prejudice is that Manning's own words in the video were the only admissible evidence that Defendant was a "caretaker" under the law. As evidenced by our analysis above, that argument is unpersuasive. Our conclusion that the State put forth sufficient evidence to prove Defendant was a "caretaker" was reached without regard to the challenged interview, or anything Manning told Barsaleau during her interview. Rather, the testimony of the DSS workers, police officers, and medical professionals who worked on this case, along with Defendant's own statements to DSS and police, provide sufficient evidence that Defendant was Manning's caretaker. As our analysis above demonstrates, there is sufficient evidence from which a jury could conclude Defendant was Manning's caretaker regardless of anything Manning told police in her interview.

Moreover, one could reasonably argue Manning's interview was more helpful than it was prejudicial to Defendant's argument that she was innocent. For example, Manning told Barsaleau, "I'm not being mistreated" and that, "I am being taken good care of." Indeed, Defendant's attorney relied upon these quotes during his cross-examination of Barsaleau, making sure the jurors had heard Manning tell Barsaleau Defendant was taking good care of her.

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Even without the evidence from Manning's interview, the State's evidence was adequate to prove Defendant was Manning's caretaker. As Defendant's only real argument<sup>2</sup> as to prejudice is that without Manning's interview a reasonable juror could not have concluded Defendant was a "caretaker" under the statute, we cannot conclude—after a careful examination of the entire record—Defendant established the trial court's purported error had a probable impact on the jury's conclusion that she was Manning's caretaker or its eventual guilty verdict. The trial court did not commit plain error in allow Manning's interview with police to be played for the jury.

**CONCLUSION**

The State presented sufficient evidence from which a reasonable jury could conclude Defendant was Manning's "caretaker" and therefore guilty of neglecting an elder adult in violation of N.C.G.S. § 14-32.3. The trial court did not err in denying Defendant's motion to dismiss for insufficient evidence. Additionally, the trial court did not plainly err in allowing the video of Manning's interview with police to be played for the jury.

**AFFIRMED.**

Judges ZACHARY and ARROWOOD concur.

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2. Defendant also notes that "given Manning's frail and distressed appearance, the video interview was also highly prejudicial and inflammatory for reasons unrelated to the content of the statements." This does not amount to an independent argument regarding prejudice given that "Defendant cites no law in support of [her] contention" that the alleged inflammatory nature of this previously unchallenged evidence constitutes grounds for a new trial. See *Hennessey v. Duckworth*, 231 N.C. App. 17, 24, 752 S.E.2d 194, 200 (2013). Nevertheless, this reasoning is unpersuasive given that the State introduced numerous unchallenged photographs of Manning both before she was taken to the hospital and afterward—many of which were much more graphic in their depiction of her "frail and distressed appearance" at that time than the video at issue.

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STATE OF NORTH CAROLINA

v.

JASON EDWARD WELDY

No. COA19-761

Filed 2 June 2020

**Drugs—keeping or maintaining a car for keeping or sale of controlled substances—sufficiency of evidence**

In a prosecution for multiple drug offenses, the State did not present substantial evidence that defendant kept or maintained a vehicle for the purpose of keeping or selling drugs within the meaning of N.C.G.S. § 90-108(a)(7) where there was no evidence that defendant had title to or had any property interest in the car he was driving when he was pulled over (which was owned by his wife and mother-in-law), and where the evidence did not show that he “kept” the car for illegal purposes since he was observed driving it for no more than 25 minutes, and after he was stopped, the drugs were found directly on his person and no other paraphernalia related to the drug trade was found in the car.

Judge BERGER dissenting.

Appeal by Defendant from judgments entered 12 February 2019 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 1 April 2020.

*Attorney General Joshua H. Stein, by Special Deputy Attorney General Creecy C. Johnson, for the State-Appellee.*

*Sarah Holladay for Defendant-Appellant.*

COLLINS, Judge.

Defendant appeals from judgments entered upon jury verdicts of guilty of, among other crimes, keeping or maintaining a vehicle for the keeping or sale of controlled substances (“keeping a vehicle”). Defendant argues that the trial court erred by denying his motion to dismiss for insufficient evidence the charge of keeping a vehicle. As there was insufficient evidence that Defendant kept or maintained a vehicle or that he did so for the keeping or selling of controlled substances, the trial court erred in denying Defendant’s motion to dismiss that

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charge. We, therefore, reverse the denial of Defendant's motion to dismiss, vacate Defendant's conviction for keeping a vehicle, and remand for resentencing.

**I. Background**

On 16 July 2018, a grand jury indicted Defendant Jason Edward Weldy on charges of trafficking in methamphetamine by transportation, trafficking in methamphetamine by possession, possession with the intent to sell or distribute methamphetamine, trafficking in heroin by transportation, trafficking in heroin by possession, possession with the intent to sell or distribute heroin, and keeping or maintaining a vehicle for the keeping or sale of controlled substances. The State subsequently dismissed the charge of trafficking in methamphetamine by possession because a typographical error rendered the indictment fatally flawed.

On 11 February 2019, Defendant's case came on for jury trial. The evidence at trial tended to show the following: In November 2017, narcotics investigators with the Forsyth County Sheriff's Office received information from the Stokes County Narcotics Office that Defendant was selling illegal drugs in Forsyth County. On 30 November 2017, Forsyth County narcotics investigators surveilled Defendant as he drove a Nissan Maxima around town. The investigators followed Defendant in unmarked law enforcement vehicles and observed Defendant driving the car alone. Investigator A.R. Joyner testified that Defendant "would take random turns. . . . I observed him just turning back onto the road he was on and going back in the direction he came, which is a countersurveillance technique that I know . . . those involved in illegal activities do."

After following Defendant for about 20-25 minutes, Joyner saw Defendant park at the Quality Inn. Defendant went inside, stayed a few minutes, and came back out. As Defendant drove away from the hotel, officers pulled Defendant over for driving without a license. Joyner frisked Defendant to check for weapons, finding none. Joyner saw a bulge between Defendant's belt and his hip bone. When Joyner touched the bulge, she believed it to be methamphetamine. Another officer retrieved the bulge and Joyner saw it was a clear, plastic bag containing a "white, clear-ish, hard crystal-like" substance. The substance was later determined to be 56.38 grams of methamphetamine, an amount Joyner testified was not consistent with personal use. An officer retrieved another plastic bag containing an off-white, powdery substance from Defendant's pocket. The substance was later determined to be 6.84 grams of heroin, an amount Joyner testified was not a typical "user amount" but was instead consistent with "be[ing] for sale." Joyner

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testified that Defendant's wife and mother-in-law were the registered owners of the car.

On 12 February 2019, the jury found Defendant guilty of all charges. The trial court sentenced Defendant to a total of 210-279 months' imprisonment and assessed \$150,000 in fines. Following entry of judgment, Defendant gave oral notice of appeal in open court.

**II. Discussion**

Defendant argues that the trial court erred by denying his motion to dismiss the charge of keeping a vehicle because the State presented insufficient evidence that Defendant kept or maintained a vehicle or that he did so for the purpose of keeping or selling illegal drugs.

In ruling on a motion to dismiss, "the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator. Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion." *State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) (internal quotation marks and citation omitted). The evidence must be viewed "in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993) (citation omitted). "[W]hen the evidence only raises a suspicion of guilt, a motion to dismiss must be granted." *State v. Foye*, 220 N.C. App. 37, 41, 725 S.E.2d 73, 77 (2012) (citation omitted). However, "[i]f there is more than a scintilla of competent evidence to support allegations in the warrant or indictment, it is the court's duty to submit the case to the jury." *State v. Everhardt*, 96 N.C. App. 1, 11, 384 S.E.2d 562, 568 (1989) (internal quotation marks and citation omitted), *aff'd*, 326 N.C. 777, 392 S.E.2d 391 (1990). This Court reviews a trial court's denial of a motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

Defendant was convicted of keeping or maintaining a vehicle which is used for the keeping or selling of a controlled substance, in violation of N.C. Gen. Stat. § 90-108(a)(7). That provision states, in pertinent part, that "[i]t shall be unlawful for any person . . . [t]o knowingly keep or maintain any . . . vehicle . . . which is used for the keeping or selling of [controlled substances] in violation of this Article." N.C. Gen. Stat. § 90-108(a)(7) (2019).

**A. Keep or maintain a vehicle**

"[T]he word 'keep,' in the 'keep or maintain' language of subsection 90-108(a)(7), refers to possessing something for at least a short period



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of time—or intending to retain possession of something in the future—for a certain use.” *State v. Rogers*, 371 N.C. 397, 402, 817 S.E.2d 150, 154 (2018).<sup>1</sup> The word “maintain” as it is used to refer to a person who “keep[s] or maintain[s]” a vehicle or dwelling within the meaning of subsection 90-108(a)(7) means “to bear the expense of; carry on . . . hold or keep in an existing state or condition.” *State v. Moore*, 188 N.C. App. 416, 423, 656 S.E.2d 287, 292 (2008) (omission in original) (internal quotation marks and citation omitted).

Although our courts have defined the words “keep” and “maintain” separately, they do not describe separate offenses, but are similar terms, often used interchangeably, to establish a singular element of the offense. Whether a vehicle is “kept or maintained” for the keeping or selling of controlled substances depends on the totality of the circumstances. *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584 (2010) (citing *State v. Bowens*, 140 N.C. App. 217, 221, 535 S.E.2d 870, 873 (2000)). Circumstances courts have considered in determining whether a defendant “kept or maintained” a vehicle within the meaning of N.C. Gen. Stat. § 90-108(a)(7) include defendant’s use of the vehicle, title to or ownership of the vehicle, property interest in the vehicle, payment toward the purchase of the vehicle, and payment for repairs to or maintenance of the vehicle. *See Rogers*, 371 N.C. at 402, 817 S.E.2d at 154 (sufficient evidence that defendant kept a vehicle where officers observed defendant driving the vehicle for approximately 90 minutes, defendant was the only person driving the car, and a “service receipt [was] found inside the Cadillac bearing defendant’s name—a receipt that bore a date from about two and a half months before defendant’s arrest”); *State v. Alvarez*, 260 N.C. App. 571, 575, 818 S.E.2d 178, 182 (2018), *aff’d per curiam*, 372 N.C. 303, 828 S.E.2d 154 (2019) (sufficient

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1. While the Supreme Court in *Rogers* “reject[ed] any notion” expressed in *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994), that the “keeping or selling” element required the drugs to be stored “for a certain minimum period of time[.]” *Rogers*, 371 N.C. at 406, 817 S.E.2d at 157, this rejection is inapplicable to the “keep or maintain” element. Indeed, the Court in *Rogers* explained,

Ordinarily, words used in one place in [a] statute have the same meaning in every other place in the statute. But there are exceptions to that rule, and this is one. By making it a crime to “keep” a car “which is used for the keeping” of controlled substances, subsection 90-108(a)(7) uses the word “keep” and its variant “keeping” to mean different things. We have already noted that in the first instance, the word “keep” refers to possessing something for at least a short period of time, or to possessing something currently and intending to retain possession of it in the future, for some designated purpose or use.

*Id.* at 403, 817 S.E.2d at 155 (certain internal quotation marks and citations omitted).

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evidence that “defendant knowingly kept or maintained the truck for the purpose of keeping or selling cocaine [where a]lthough the vehicle was registered in his wife’s name, defendant described it as ‘[his] truck[;]’ [d]efendant admitted that it was his work vehicle, that no other party used it, and that he built the wooden drawers and compartments located in the back of the cab”); *Hudson*, 206 N.C. App. at 492, 696 S.E.2d at 584 (sufficient evidence that defendant kept or maintained a vehicle where the “bill of lading for the Mercedes . . . shows that Defendant picked up the vehicle . . . [and] maintained possession as the authorized bailee of the vehicle continuously and without variation for two days[,] . . . [h]aving stopped to rest overnight on at least one occasion during that time period”). Although occupancy of the vehicle is a relevant circumstance, occupancy alone will not support the element of keeping or maintaining. *See State v. Spencer*, 192 N.C. App. 143, 148, 664 S.E.2d 601, 605 (2008) (“[O]ccupancy, without more, will not support the element of ‘maintaining’ a dwelling.”).

In this case, the evidence before the trial court that Defendant “kept or maintained” the car is as follows: Officers observed Defendant drive the car for about 20-25 minutes. He then stopped at a hotel, went inside for a few minutes, came back out, and had started to drive away when he was pulled over. Defendant’s wife and mother-in-law were the registered owners of the car.

The State presented no evidence that Defendant had title to or owned the vehicle, had a property interest in the vehicle, paid toward the purchase of the vehicle, or paid for repairs to or maintenance of the vehicle. Thus, the State presented no evidence that Defendant “maintained” the car. *See Moore*, 188 N.C. App. at 423, 656 S.E.2d at 292; *Hudson*, 206 N.C. App. at 492, 696 S.E.2d at 584.

The question then becomes whether Defendant’s use of the car was sufficient evidence that he “kept” the car, within the meaning of the statute. The State argues that because Defendant possessed the vehicle for 20-25 minutes and “used it as an integral part of his drug trafficking operation,” Defendant kept the vehicle as in *Rogers*.

In *Rogers*, our Supreme Court analyzed the meaning of the word “keep” as it is used to refer to a person who “keep[s] or maintain[s]” a vehicle within the meaning of subsection 90-108(a)(7). *Rogers*, 371 N.C. at 403, 817 S.E.2d at 155. The Court explained,

[w]hen you “keep” a “shop,” for instance—that is, when you are a shopkeeper—you have possession of the shop for a designated purpose or use (usually to sell goods). You

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generally will have possessed that shop for at least a short period of time, but in some instances, you may be said to be “keep[ing]” a shop even when you have just opened it, if the circumstances indicate that you intend to retain the shop for continued use in the future. *Cf. The New Oxford American Dictionary* 952 (3d ed. 2010) (defining “keep” as “have or retain possession of” or “retain or reserve for use in the future”). This possession must have occurred for at least a short period of time, or the circumstances must indicate an intent to retain that property in the future (and in many cases, both may be evident).

*Id.* at 402, 817 S.E.2d at 154. The Court summarized as follows: “Thus, the word ‘keep,’ in the ‘keep or maintain’ language of subsection 90-108(a)(7), refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use.” *Id.*

In *Rogers*, officers observed defendant driving a Cadillac for approximately 90 minutes, and the State introduced at trial “an additional, very important piece of evidence: the service receipt found inside the Cadillac bearing defendant’s name—a receipt that bore a date from about two and a half months before defendant’s arrest.” *Id.* From this evidence, “a reasonable jury could conclude that defendant had possessed the car for about two and a half months, at the very least.” *Id.* at 402-03, 817 S.E.2d at 154. “The State therefore presented sufficient evidence that defendant ‘ke[pt]’ the Cadillac.” *Id.* at 403, 817 S.E.2d at 154-55.

The Court explained in a footnote, however, that while “[p]ossessing a car for two and a half months is sufficient to show that an individual ‘ke[pt]’ a car under subsection 90-108(a)(7)[,] . . . we do not mean to imply that possession for that long is necessary to satisfy that element.” *Id.* at 403 n.2, 817 S.E.2d at 154 n.2. However, the Court “need[ed] not, and d[id] not, take any position on” whether “‘[k]eep[ing]’ a car for a much shorter period of time may suffice[.]” *Id.* The Court further explained, “of course, as we have already suggested, the State may also be able to prove that a defendant has ‘ke[pt]’ a car by proving that the defendant possessed a car, and that he intended to continue possessing it in the future, when he was arrested.” *Id.*

The facts in this case are readily distinguishable from the facts in *Rogers*. First, unlike in *Rogers* where the State presented a service receipt found inside the Cadillac bearing defendant’s name, the State in this case presented no evidence linking Defendant directly to the car or

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showing Defendant had paid to service the car. Moreover, Defendant's possession of the car for 20-25 minutes is a considerably shorter period of time than the two and a half months that defendant possessed the car in *Rogers*. The 20-25-minute period is also a considerably shorter period of time than the two days defendant possessed the Mercedes in *Hudson*. *Hudson*, 206 N.C. App. at 492, 696 S.E.2d at 584.<sup>2</sup> Moreover, the State failed to offer any evidence "that [D]efendant . . . intended to continue possessing it in the future, when he was arrested." *Rogers*, 371 N.C. at 402, 817 S.E.2d at 154. Accordingly, the State failed to present sufficient evidence that Defendant "kept" the car.

Under the totality of the circumstances, Defendant's possession of the car for approximately 20-25 minutes, standing alone, was insufficient evidence that Defendant "kept or maintained" the car. As the State failed to present sufficient evidence that Defendant "kept or maintained" the car, the trial court erred by denying Defendant's motion to dismiss.

**B. Keeping or selling controlled substances**

Even if, however, the State had presented sufficient evidence that Defendant "kept or maintained" a car, there was insufficient evidence that he did so for the purpose of "keeping or selling" controlled substances.

"[T]he keeping . . . of" drugs referred to in N.C. Gen. Stat. § 90-108(a)(7) means "the storing of drugs." *Id.* at 405, 817 S.E.2d at 155. However, subsection 90-108(a)(7) does not require that a car be used "to store drugs for a certain minimum period of time—or that evidence of drugs must be found in the vehicle, building, or other place on more than one occasion—for a defendant to have violated subsection 90-108(a)(7)." *Id.* at 406, 817 S.E.2d at 156-57 (rejecting the reasoning in *Mitchell* that "the keeping . . . of [drugs]" means "not just possession, but possession that occurs over a duration of time[.]" *Mitchell*, 336 N.C. at 32, 442 S.E.2d at 30). Nonetheless, subsection 90-108(a)(7) "does not create a separate crime simply because the controlled substance was temporarily in a vehicle." *Rogers*, 371 N.C. at 405, 817 S.E.2d at 156 (internal quotation marks and citation omitted). "In other words, merely possessing or transporting drugs inside a car—because, for instance, they are in an occupant's pocket or they are being taken from one place to another—is not enough to justify a conviction under the 'keeping' element of

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2. Under prior case law and *Rogers*' analysis of the word "keep," Defendant's possession of the car was more akin to a shopkeeper having "just opened" a shop than to a shopkeeper who has "possessed that shop for at least a short period of time[.]" *Rogers*, 371 N.C. at 402, 817 S.E.2d at 154.

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subsection 90-108(a)(7).” *Id.* “Rather, courts must determine whether the defendant was using a car for the *keeping* of drugs—which, again, means the *storing* of drugs—and courts must focus their inquiry on the *use*, not the contents, of the vehicle.” *Id.* (internal quotation marks and citation omitted). The meaning of a vehicle which is used for “selling” controlled substances is self-evident. *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30. The determination of whether a vehicle is used for keeping or selling controlled substances will depend on the totality of the circumstances. *Rogers*, 371 N.C. at 406, 817 S.E.2d at 157 (citation omitted). As restated in *Rogers*, in addition to evidence of controlled substances found, “the State must produce other incriminating evidence of the ‘totality of the circumstances’ and more than just evidence of a single sale of illegal drugs or ‘merely having drugs in a car (or other place)’ to support a conviction under this charge.” *State v. Miller*, 826 S.E.2d 562, 566-67 (N.C. Ct. App. 2018) (quoting *Rogers*, 371 N.C. at 404, 817 S.E.2d at 156).

Circumstances our courts have considered relevant to this determination include: the presence of controlled substances in the car; the packaging of the controlled substances; the amount of controlled substances found in the car; the presence of drug paraphernalia in the car; the presence of large amounts of cash in the car; and whether the controlled substances were hidden in the car. *See, e.g., Rogers*, 371 N.C. at 403, 817 S.E.2d at 155; *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30; *Alvarez*, 260 N.C. App at 575, 818 S.E.2d at 182; *State v. Dunston*, 256 N.C. App. 103, 106, 806 S.E.2d 697, 699 (2017); *State v. Frazier*, 142 N.C. App. 361, 366, 542 S.E.2d 682, 687 (2001).

In *Rogers*, the State presented sufficient evidence that defendant kept a car to keep illegal drugs where law enforcement officers found two purple plastic baggies containing cocaine in a small space behind the door covering the vehicle’s gas cap; a marijuana cigarette and \$243 hidden in a boot in the vehicle’s passenger compartment; and similar purple plastic baggies containing larger amounts of cocaine, a digital scale, and small zip-lock bags in defendant’s hotel room. *Rogers*, 371 N.C. at 403, 817 S.E.2d at 155.

In *Alvarez*, the State presented sufficient evidence that defendant used a car to keep or sell illegal drugs where officers discovered one kilogram of cocaine wrapped in plastic and oil to evade detection by canine units in a false-bottomed compartment on defendant’s truck bed floor, defendant was aware that cocaine was hidden in his truck and willingly participated in a drug transaction in the Walmart parking lot, and defendant held himself out as responsible for the ongoing distribution

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of drugs like those discovered in the truck. *Alvarez*, 260 N.C. App. at 575-76, 818 S.E.2d at 182.

Similarly, in *Dunston*, the State presented sufficient evidence that defendant used a car for the keeping or selling of illegal drugs where defendant was in the car at a location known to law enforcement for a high level of illicit drug activity and was observed by law enforcement unwrapping cigars and re-rolling them after manipulating them, actions consistent with distributing marijuana. *Dunston*, 256 N.C. App. at 106, 806 S.E.2d at 699. While in the parking lot, the driver of the vehicle was observed in a hand-to-hand exchange of cash with another individual. *Id.* When later searched by officers, the driver was discovered to have marijuana, and defendant no longer possessed the “cigars[.]” *Id.* Upon searching the car, officers discovered a travel bag containing a 19.29-gram mixture of heroin, codeine, and morphine; plastic baggies; two sets of digital scales; and three cell phones. *Id.*

The State’s uncontroverted evidence in this case shows that the drugs seized from Defendant were found in his waistband and pants pocket. While this evidence would support a conviction for possession of those drugs, “subsection 90-108(a)(7) does not ‘create a separate crime simply because the controlled substance was temporarily in a vehicle.’” *Rogers*, 371 N.C. at 405, 817 S.E.2d at 156 (quoting *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30). While Defendant’s possession of the drugs was consistent with “drug use, or with the sale of drugs generally, [it] do[es] not implicate the *car* with the sale of drugs.” *Mitchell*, 336 N.C. at 33, 442 S.E.2d at 30 (emphasis added).

As “merely possessing or transporting drugs inside a car—because, for instance, they are in an occupant’s pocket or they are being taken from one place to another—is not enough to justify a conviction under the ‘keeping’ element of subsection 90-108(a)(7)[.]” *Rogers*, 371 N.C. at 405, 817 S.E.2d at 156 (citation omitted), and the State presented no evidence that the car was used for the purpose of keeping or selling drugs—no cash; no scales, baggies, or other drug paraphernalia; no cell phones; no modifications made to the car for the concealment of drugs; and no drugs in the car itself, hidden or otherwise—the State’s evidence in this case is insufficient to support a conclusion that Defendant kept or maintained the vehicle for the keeping or selling of controlled substances. *See Miller*, 826 S.E.2d at 567 (insufficient evidence that defendant maintained a dwelling for keeping or selling controlled substances where “the State offered no evidence showing any drugs or drug paraphernalia, scales, residue, baggies, large amounts of cash, weapons, or other implements of the drug trade, were observed or seized from

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Defendant's home [and t]he State offered no evidence of any other drug sales taking place at Defendant's home, beyond the sale at issue").

The State argues that there was evidence of a "ledger of drug transactions in the vehicle" and that this evidence was sufficient evidence that Defendant kept the car for the "selling" of controlled substances. The State mischaracterizes the nature of the evidence offered at trial.

On cross-examination, Joyner testified, "There was a ledger found in the vehicle. I don't recall the contents of the ledger, but there were multiple entries in the ledger." She clarified that it was "[p]aper with written amounts and what the amounts were for." On redirect examination, Joyner stated that it was a "composition book, notebook paper, and it had dates and amounts. I would say it was like a glorified, almost like a checkbook, a ledger, a journal."

Joyner admitted that she had not seen the notebook produced in court and the record shows the notebook was not introduced into evidence. Moreover, there was no testimony that the dates and amounts in the notebook were related to drug transactions (or anything else, for that matter) and no testimony linking the notebook to Defendant. Joyner's testimony regarding a notebook containing unspecified dates and entries was not evidence of a circumstance that could be considered in determining whether Defendant kept the car to keep or sell controlled substances.

Viewed in the light most favorable to the State, the evidence shows that when Defendant was pulled over for driving without a license, a single bag containing 56.39 grams of methamphetamine was found in his waistband and a single bag containing 6.84 grams of heroin was found in his pocket. Defendant was tried for and convicted of trafficking in methamphetamine by transportation, possession with the intent to sell or distribute methamphetamine, trafficking in heroin by transportation, trafficking in heroin by possession, and possession with the intent to sell or distribute heroin; Defendant has not appealed those convictions. However, under a totality of the circumstances, the State's evidence in this case was insufficient evidence that Defendant kept or maintained a vehicle for the "keeping or selling" of controlled substances.

**III. Conclusion**

As there was insufficient evidence that Defendant "kept or maintained" the car or that he did so for the purpose of "keeping or selling controlled substances," N.C. Gen. Stat. § 90-108(a)(7), the trial court erred by denying Defendant's motion to dismiss this charge. We, therefore,



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reverse the trial court's denial of this motion and vacate Defendant's conviction for keeping or maintaining a vehicle for keeping or selling controlled substances. Because the trial court consolidated Defendant's conviction for keeping a vehicle with his conviction for trafficking in heroin by possession for sentencing purposes, we must remand for resentencing as to the trafficking in heroin by possession conviction. *See State v. Fuller*, 196 N.C. App. 412, 426, 674 S.E.2d 824, 833 (2009) ("Because the trial court consolidated that conviction with defendant's PWISD conviction into a single judgment for sentencing purposes, we must remand for resentencing as to the PWISD conviction.").

REVERSED AND REMANDED.

Judge YOUNG concurs.

Judge BERGER dissents by separate opinion.

BERGER, Judge, dissenting in separate opinion.

Because the State presented substantial evidence that Defendant knowingly kept a vehicle which was used for the selling of controlled substances, I respectfully dissent.

Although the crime for which Defendant was charged is typically referred to in practice as "maintaining a vehicle," there is more to it than that. A defendant may be found guilty of violating Section 90-108(a)(7) if the State proves the defendant: (1) knowingly, (2) keeps *or* maintains, (3) a vehicle,<sup>1</sup> (4) which was used for the keeping *or* selling, (5) of controlled substances. N.C. Gen. Stat. § 90-108(a)(7) (2019); *State v. Rogers*, 371 N.C. 397, 401, 817 S.E.2d 150, 153 (2018).

The majority neglects the use of the word "or" in the statute. This reading of the statute limits the scope of the activity proscribed by the legislature, and effectively rewrites the statute to allow conviction only for defendants who knowingly maintain a vehicle which is used for the keeping of controlled substances.

**I. Keeps *or* Maintains**

In *State v. Mitchell*, 336 N.C. 22, 442 S.E.2d 24 (1994), the North Carolina Supreme Court determined that "[k]eep" . . . denotes not just

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1. The statute also applies to dwellings, boats, aircraft, and other places that may be used to keep or sell controlled substances.



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possession, but possession that occurs over a duration of time.” *Id.* at 32, 442 S.E.2d at 30. However, our Supreme Court in *Rogers*, expressly modified this language, holding “the word ‘keep,’ in the ‘keep or maintain’ language of subsection 90-108(a)(7), refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use.” *Rogers*, 371 N.C. at 402, 817 S.E.2d at 154. “To the extent that *Mitchell*’s ‘duration of time’ requirement conflicts with the text of subsection 90-108(a)(7) . . . this aspect of *Mitchell* is disavowed.” *Id.* at 406, 817 S.E.2d at 157. “The totality of the circumstances controls, and whether there is sufficient evidence of the ‘keeping or maintaining’ element depends on several factors, none of which is dispositive.” *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584 (2010). Thus, determination of this element is a fact-specific inquiry.

*Rogers* is similar to the present case. In *Rogers*, police officers conducted surveillance on a defendant for an hour and a half. They observed the defendant drive up to a hotel in a Cadillac, exit the hotel, and then drive off in the same vehicle. *Rogers*, 371 N.C. at 402, 817 S.E.2d at 154. The defendant was the only occupant of the vehicle, and he was the only individual officers observed using the vehicle during their surveillance. *Id.* at 402, 817 S.E.2d at 154. The Cadillac was not registered in the defendant’s name; however, there was a service receipt in the vehicle dated two months prior to the arrest bearing the defendant’s name. *Id.* at 399-400, 817 S.E.2d at 152-53. The Court determined that “defendant had possessed the car for about two and a half months, at the very least [and] . . . [t]he State therefore presented sufficient evidence that defendant ‘ke[pt]’ the Cadillac.” *Id.* at 402-03, 817 S.E.2d at 154-55.

*Rogers* clarifies the Court’s decision in Footnote 2:

Possessing a car for two and a half months is sufficient to show that an individual “ke[pt]” a car under subsection 90-108(a)(7). But we do not mean to imply that possession for that long is necessary to satisfy that element. “[K]eep[ing]” a car for a much shorter period of time may suffice—we need not, and do not, take any position on that to decide this case. And, of course, as we have already suggested, the State may also be able to prove that a defendant has “ke[pt]” a car by proving that the defendant possessed a car, and that he intended to continue possessing it in the future, when he was arrested.

*Id.* at 403 n.2, 817 S.E.2d at 154 n.2.

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This makes sense. Prior decisions of this Court have focused solely on “maintaining” a vehicle through proof of service receipts, payment of taxes, and title ownership. However, this limited reading allows individuals to escape the accountability and ignores the reality of the drug trade.

Let’s consider the example of a drug dealer who steals a car. He then uses the stolen vehicle to travel to a prearranged location to obtain drugs that he intends to distribute to other individuals for money. When he arrives at the predetermined location, he exits the stolen vehicle, enters the predetermined location, and exits the predetermined location a few minutes later. He gets back into the stolen vehicle with a trafficking amount of illegal drugs. The drug dealer in the example *kept* the stolen vehicle in that he possessed the vehicle to aid or further his drug trafficking operation. What if he used the stolen vehicle to further his drug activity for weeks, months, or even years?

However, because the car was stolen, the drug dealer would not have title to the vehicle. In addition, it’s unlikely he would have serviced the stolen vehicle, and it is also unlikely the drug dealer would have paid taxes on the stolen vehicle. Under the majority opinion, an individual who steals a vehicle and uses it to sell drugs could never be convicted under Section 90-108(a)(7). The same is true for the common practice of drug dealers using or borrowing vehicles in an effort to avoid detection.

Here, officers had Defendant under surveillance during a four- to five-hour operation. During surveillance, Defendant drove the vehicle in an evasive manner. One officer testified that he observed Defendant in the vehicle for 20-25 minutes prior to entering the Quality Inn. Defendant went inside the hotel for a few minutes, exited, and then drove away. When Defendant was pulled over, he was the only occupant observed in the vehicle. Upon searching Defendant, officers discovered 56.38 grams of methamphetamine and 6.84 grams of heroin. Officers testified that neither of these amounts were consistent with personal use. Rather, these were trafficking amounts consistent with selling.

The State presented substantial evidence, based on the totality of the circumstances, that Defendant “kept” the vehicle, and thus met this element under Section 90-108(a)(7) and *Rogers*.

## II. Keeping or Selling

The prohibition in Section 90-108(a)(7) applies “only when [the vehicle] is used for ‘keeping or selling’ controlled substances.” *Mitchell*, 336 N.C. at 32, 442 S.E.2d at 29. “The determination of whether a vehicle

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... is used for keeping or selling controlled substances will depend on the totality of the circumstances.” *Id.* at 34, 442 S.E.2d at 30. “[C]ourts must determine whether the defendant was using a car for the *keeping* [or selling] of drugs—which, again, means the *storing* [or sale] of drugs—and courts must focus their inquiry ‘on the *use*, not the contents, of the vehicle.’ ” *Rogers*, 371 N.C. at 405, 817 S.E.2d at 156 (citations omitted). In addition, “evidence that a defendant has transported or possessed drugs inside a car may, in conjunction with additional evidence, be enough to satisfy the ‘*selling*’ element of subsection 90-108(a)(7).” *Id.* at 405 n.4, 817 S.E.2d at 156 n.4.

The majority essentially finds that because Defendant merely possessed or transported the drugs, and there was no other evidence of drug activity, Defendant’s motion should have been allowed. However, the totality of the circumstances demonstrates otherwise.

In denying Defendant’s motion to dismiss, the trial court stated,

[t]he Court also notes that an experienced detective testified that the sheer volume of the methamphetamine and heroin indicated they were seller amounts, not user amounts. . . . [T]he detective testified that the defendant had a ledger in his car, which indicated he was using the car both to transport, obviously large quantities of methamphetamine and heroin, but also had a ledger in the car indicating they were his, at least in the light most favorable to the non-moving party, records of the client’s transactions—of the defendant’s transactions and/or customers . . . .

The majority correctly notes that the ledger found in the vehicle was never entered into evidence or authenticated. However, while the ledger was not entered into evidence by the State, defense counsel opened the door to testimony concerning the ledger, and its significance to a narcotics investigator with more than eighteen years of law enforcement experience, when, he asked Detective Joyner: “Other than your stating that in your training and experience that amount of drugs would not be a user amount, *was there anything else seized from that vehicle or from [Defendant] that would indicate he was selling any sort of illegal narcotic?*” (Emphasis added). Detective Joyner responded that a ledger was found in the vehicle that contained written amounts and what those amounts were for. The State followed up on redirect, and Detective Joyner described the ledger as a composition book, a “checkbook, a ledger, a journal” that contained dates and amounts.

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Thus, there was some evidence of business transactions that, standing alone may be innocent behavior unrelated to Defendant's actions in trafficking and selling narcotics. However, this is evidence that may properly be considered under the totality of the circumstances. Moreover, this evidence is to be considered in the light most favorable to the State, with every inference therefrom to be considered in the State's favor. *See State v. Chekanow*, 370 N.C. 488, 492, 809 S.E.2d 546, 549-50 (2018) ("In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." (citation and quotation marks omitted)).

Further, the trial court may consider evidence that Defendant was involved in the illegal drug business to support an inference that the vehicle was used to sell drugs. *See Rogers*, 371 N.C. at 404, 817 S.E.2d at 155 (holding that "evidence suggesting that defendant was involved in selling drugs also permits us to draw a reasonable inference that defendant was using the [vehicle] to store cocaine.").

In considering whether Defendant was involved in the sale of illegal drugs, the trial court determined that

in [the] light most favorable to the non-moving party . . . the tip from the Stokes County law-enforcement to the Forsyth County law enforcement, identified the defendant with specificity and that he was engaged . . . in the illegal drug trade or drug business, selling drugs in Forsyth County . . . . After they observed him by himself driving a car from one place to another, they conducted a traffic stop and found trafficking amounts of heroin and methamphetamine on the defendant. The defendant then made multiple—whether they're confessions or admissions, on the scene . . . that both confirmed the Stokes County law-enforcement officer's information, which is that the defendant was involved in the drug trade, the illegal drug business . . . . [W]hen those substances were taken from his person, instead of denying, certainly it appears he admitted he was involved in the drug trade.

Thus, in considering the totality of the circumstances, the State presented substantial evidence that Defendant used the vehicle to sell, or otherwise aid in the selling, of controlled substances. The State was not required to prove that Defendant stored or hid the trafficking amount of methamphetamine and heroin in the vehicle under the facts of this case.

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To this point, the majority focuses on the absence of evidence of money, scales, etc. However,

[t]he question here is not whether evidence that does not exist entitles Defendant to a favorable ruling on his motion to dismiss. That there may be evidence in a typical drug [case] that is non-existent in another case is not dispositive . . . . Instead, the question is whether the totality of the circumstances, based on the competent and incompetent evidence presented, when viewed in the light most favorable to the State, permits a reasonable inference that Defendant [used the vehicle for keeping or selling controlled substances].

*State v. Blagg*, \_\_\_ N.C. App. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (2020).

Even if we assume that this case can be characterized as a close one, we have held that “[i]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury.” *State v. Coley*, 257 N.C. App. 780, 789, 810 S.E.2d 359, 365 (2018). Thus, I would find that the trial court did not err.

## CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 JUNE 2020)

DEVINE v. DEVINE No. 19-913	Chowan (17CVD295)	Reversed and Remanded
GAINES-PERKINS v. McGLYNN RESTORATION, LLC No. 19-821	Mecklenburg (18CVS2615)	Affirmed
IN RE J.T. No. 19-635	Onslow (11JA218) (18JA7)	VACATED AND REMANDED IN PART; AFFIRMED IN PART
MARLOW v. N. HOSP. DIST. OF SURRY CNTY. No. 19-214	Surry (17CVS1650)	Affirmed
STATE v. ASBURY No. 19-470	Mecklenburg (14CRS205870-71)	Affirmed
STATE v. BYRD No. 18-1256	Buncombe (17CRS333)	No Error
STATE v. EMERSON No. 19-485	Gaston (17CRS61214) (17CRS7178) (17IFS987)	No Error
STATE v. GAGUM No. 19-83	Wake (16CRS209195)	No Error
STATE v. GUTIERREZ No. 19-755	Mecklenburg (16CRS213353-55)	No Error
STATE v. JACKSON No. 18-1122	Rowan (16CRS53700)	No plain error in part; no error in part; reversed in part
STATE v. JUDD No. 19-829	Moore (17CRS50881) (17CRS648)	Affirmed
STATE v. KEARNEY No. 19-585	Haywood (17CRS52202)	No error in part; Vacated in part and Remanded.
STATE v. LAIL No. 19-596	Lincoln (16CRS51460)	Affirmed

STATE v. McCLURE No. 19-1080	Davidson (17CRS53562)	No Error
STATE v. OWENS No. 19-1008	Orange (18CRS198) (18CRS199) (18CRS200) (18CRS51505) (18CRS51506) (18CRS51512) (18CRS51519) (18CRS51520)	Affirmed
STATE v. PERDUE No. 19-480	Rockingham (16CRS1318-19) (16CRS52193)	No Error in Part; Vacated and Remanded in Part.
STATE v. SILVER No. 19-209	Nash (16CRS51960)	No Error
STATE v. SPINKS No. 19-937	Guilford (16CRS67565)	No Error
STATE v. TAYLOR No. 19-21	Union (16CRS53801)	Vacated and Remanded
STATE v. WILDER No. 19-569	New Hanover (15CRS53204)	Affirmed





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## ADMINISTRATIVE LAW

**Contested case—petition for judicial review—jurisdiction in superior court—timely filing—untimely service**—Where two environmental nonprofits (petitioners) petitioned for judicial review in the superior court of their contested case, in which an administrative law judge affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier, the superior court properly denied the supplier's motion to dismiss the petition for judicial review for lack of subject matter jurisdiction. Although petitioners did not timely serve notice of their petition to the supplier within 10 days, as required under N.C.G.S. § 150B-46, petitioners timely filed the petition itself, and therefore the superior court had jurisdiction to extend the time for service and subsequently hear the case. **Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, 674.**

**Judicial review of contested case—persons aggrieved—substantial prejudice**—After an administrative law judge (ALJ) affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier allowing it to discharge mine wastewater into tributaries in Blounts Creek, the superior court properly concluded that two environmental nonprofits (petitioners) met their burden under the Administrative Procedure Act of proving that DEQ substantially prejudiced their rights in issuing the permit, making them “persons aggrieved” entitled to judicial review of the ALJ's order. With support from multiple affidavits, petitioners alleged that DEQ violated its own regulations by issuing the permit and that the discharge of wastewater into Blounts Creek would adversely affect the water quality, native wildlife, and recreational and commercial activities in the area. **Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, 674.**

**Judicial review of contested case—water pollutant permit—biological integrity standard**—After an administrative law judge (ALJ) affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier allowing it to discharge mine wastewater into tributaries in Blounts Creek, the superior court improperly reversed the ALJ's decision on grounds that DEQ failed to ensure the permit reasonably complied with the “biological integrity standard” for surface waters under the N.C. Administrative Code. Not only did the whole record support the ALJ's findings of fact, which showed DEQ conducted thorough evaluations to ensure compliance with the biological integrity standard, but also the superior court improperly substituted its own findings of fact (based on witness testimony taken out of context) and misinterpreted the standard rather than deferring to DEQ's interpretation of it. **Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, 674.**

## APPEAL AND ERROR

**Appellate jurisdiction—interlocutory appeal—facial challenge to statute—no ruling on State's motion to dismiss**—In a suit challenging a state law as unconstitutional, the Court of Appeals lacked jurisdiction to hear plaintiff's appeal from a three-judge panel's order granting summary judgment in favor of two defendants (a city and a board of education) because the order did not dispose of the case as to all of the defendants where the State's motion to dismiss was still outstanding. **Vaitovas v. City of Greenville, 578.**

**Criminal law—trial court's statutory duty to instruct the jury—instructions read to jury by clerk—no objection—appellate review**—Where, in a trial for

**APPEAL AND ERROR—Continued**

second-degree murder and drug offenses, the trial court notified the State and defendant it intended to have the clerk “help me with reading the instructions to the jury,” defendant did not invite error when his counsel stated he had no objection since it was not clear that the trial court intended to relinquish its duty to charge the jury. Because the trial court had a statutory duty to instruct the jury pursuant to N.C.G.S. § 15A-1231 and -1232, defendant did not waive appellate review by failing to object when the clerk began reading the jury instructions since the right to appeal the trial court’s violation of a statutory mandate was automatically preserved for appellate review. **State v. Grappo, 487.**

**Effective assistance of counsel—concession—statement of law—**Defendant did not receive ineffective assistance of counsel at a pretrial suppression hearing in a weapon possession case where his counsel admitted that the officer’s observation of a bulge in defendant’s pocket gave the officer reasonable suspicion to conduct a pat down search. Counsel’s statement was not a concession but was an accurate statement of the law. Therefore, counsel’s subsequent argument that the officer decided to pat down defendant prior to observing the bulge was not deficient. **State v. Anthony, 749.**

**Lack of notice of appeal in record—jurisdiction—petition for writ of certiorari—motion to amend record—**Where the record on appeal did not include a notice of appeal giving the Court of Appeals jurisdiction, the court, in its discretion, granted defendant’s petition for writ of certiorari and granted his motion to amend the record to reflect his notice of appeal. **State v. Coleman, 91.**

**Mootness—quo warranto action—procedural issues—no public interest exception—**An appeal from an order dismissing a quo warranto action (filed pursuant to N.C.G.S. § 1-516) as untimely was dismissed as moot where the matter in controversy—the manner in which a village council member was appointed—was no longer at issue because the member no longer served on the council. Where the appeal involved non-urgent procedural issues, it did not meet the standard for application of the public interest exception to mootness. **State of N.C. ex rel. Pollino v. Shkut, 272.**

**Notice of appeal—jurisdiction—limited to order appealed from—**In a wrongful death action, the Court of Appeals lacked jurisdiction to review plaintiffs’ arguments related to their Rule 59 and 60 motions (filed after the trial court dismissed their complaint) where plaintiffs’ notice of appeal only referenced the order dismissing their complaint. **Robinson v. Halifax Reg’l Med. Ctr., 61.**

**Petition for a writ of mandamus—not a substitute for appeal—motion to take judicial notice—failure to make argument—**Where the State dismissed (with leave) charges against defendant for driving while impaired and without an operator’s license and the district court denied defendant’s motion to reinstate the charges, the Court of Appeals denied defendant’s two petitions for a writ of mandamus compelling the district court to reverse its decision because the proper means to review that decision would have been to file an appeal or petition for certiorari with the superior court. The Court of Appeals also denied defendant’s motion to take judicial notice of local judicial rules because defendant made no argument explaining why it should do so. **State v. Diaz-Tomas, 97.**

**Petition for certiorari—granted as to one court decision—review unavailable for other court decision—moot argument—**Where the State dismissed (with leave) charges against defendant for driving while impaired and without an

**APPEAL AND ERROR—Continued**

operator's license, the district court denied defendant's motion to reinstate the charges, and the superior court denied defendant's petition for certiorari seeking review of the district court's ruling, the Court of Appeals dismissed defendant's argument challenging the district court's ruling where it had only granted certiorari to review the superior court's ruling. Moreover, defendant's arguments regarding the district court's ruling became moot where the Court of Appeals had already affirmed the superior court's ruling. **State v. Diaz-Tomas, 97.**

**Preservation of issues—argument challenging sufficiency of evidence—truly an objection to jury instruction**—In a prosecution for operating a vehicle without a current inspection certificate (N.C.G.S. § 20-183.8(a)(1)), the Court of Appeals declined to review defendant's argument that the trial court improperly denied his motion to dismiss the charge for insufficiency of the evidence where the court's jury instructions required proof that he willfully displayed an expired certificate but where the evidence showed he did not display any certificate. Because the trial court's instructions required proof of an unnecessary element, the Court of Appeals classified defendant's argument as challenging an erroneous jury instruction; thus, defendant's motion to dismiss did not preserve his argument for appellate review, and defendant otherwise failed to preserve it by neither objecting to the instructions at trial nor asserting plain error on appeal. **State v. Money, 140.**

**Preservation of issues—hearsay evidence—objection on other grounds—no ruling obtained**—In an equitable distribution action, a wife failed to preserve for appellate review the issue of whether the trial court erred by allowing hearsay evidence of a retirement plan valuation, because the wife objected to the evidence on different grounds before the trial court and failed to obtain a ruling on the objection she did lodge. **Best v. Staton, 181.**

**Preservation of issues—personal jurisdiction—failure to argue or obtain ruling in trial court**—On appeal from the trial court's entry of a domestic violence protective order against defendant, a nonresident, on behalf of his ex-girlfriend, defendant failed to preserve for appellate review his argument that North Carolina's long-arm statute precluded the trial court's exercise of personal jurisdiction over him. Defendant neither asserted this argument before the trial court in his motion to dismiss for lack of personal jurisdiction nor obtained a ruling from the trial court on this issue. **Mucha v. Wagner, 636.**

**Preservation of issues—pretrial motion to suppress—necessity to object at trial—necessity to move to strike**—Where defendant was charged with offenses involving possession of a weapon and his pretrial motions to suppress his stop and search were denied, defendant failed to preserve his right to challenge the stop and search on appeal when he did not object at trial to the State's question to the officer regarding the search, he did not move to strike the evidence when he objected after the officer answered the question, and he did not assert plain error on appeal. **State v. Anthony, 749.**

**Preservation of issues—right to assistance of counsel—failure to object—statutory mandate**—In a prosecution for breaking and entering, larceny, and injury to real property, defendant's argument alleging a deprivation of his constitutional right to assistance of counsel was preserved for appellate review—despite defendant's failure to object at trial—in light of the statutory mandate in N.C.G.S. § 15A-1242 protecting Sixth Amendment rights. **State v. Lindsey, 118.**

**APPEAL AND ERROR—Continued**

**Probation revocation—absconding—conviction of new crime—petition for writ of certiorari**—Where defendant's probation was revoked and his sentence activated at a hearing in which defendant admitted he willfully violated the terms and conditions of his probation by absconding and his conviction of a new crime, the Court of Appeals, after dismissing the appeal for lack of jurisdiction, denied defendant's petition for writ of certiorari to review his probation revocation because he failed to demonstrate that the ends of justice would be promoted by allowing the petition and issuing the writ. **State v. Gantt, 472.**

**Probation revocation—sentencing—pre-trial confinement credit—claim for additional credit**—The trial court's determination of the pre-trial confinement credit due defendant after revocation of his probation and activation of his sentence was not reviewable on appeal where defendant had not initially brought his claim for additional jail credit in the trial court pursuant to N.C.G.S. § 15-196.4. The Court of Appeals denied defendant's petition for writ of certiorari and dismissed the appeal without prejudice for defendant to first seek relief in the trial court. **State v. Galloway, 469.**

**Revocation of probation—defective notice of appeal**—Where defendant's pro se written notice of appeal from a judgment revoking his probation violated Appellate Rule 4 by not designating the judgment from which he was appealing or the court to which he was appealing and had no certificate of service, the Court of Appeals lacked jurisdiction to hear defendant's appeal and the appeal was dismissed. **State v. Gantt, 472.**

**Satellite-based monitoring order—no objection—Rule 2—consideration of factors**—Where defendant failed to preserve for appellate review his constitutional challenge to an order imposing lifetime satellite-based monitoring (SBM) upon his release from prison, the Court of Appeals allowed his petition for certiorari and invoked Appellate Rule 2 to reach the merits of his argument after weighing the factors described in *State v. Bursell*, 372 N.C. 196 (2019), including the substantial right implicated by the imposition of SBM (defendant's Fourth Amendment rights), the factual bases underlying the charges against defendant (he was convicted of statutory rape and other sexual offenses for having sex with two twelve-year-old girls when he was twenty-one years old), and the trial court's decision to impose SBM without receiving any argument from the parties or evidence from the State. **State v. Ricks, 348.**

**Waiver—Fourth Amendment argument—fruits of unlawful search—no motion to suppress**—In a drug trafficking case, defendant waived any right to appellate review—including plain error review—of his argument that police illegally seized him before obtaining his consent to search his vehicle and that, therefore, the trial court erred by admitting into evidence hydrocodone tablets the officers found during the search. At no point before or during trial did defendant move to suppress the hydrocodone tablets, and therefore his Fourth Amendment argument was not appealable. **State v. Ray, 330.**

**ARBITRATION AND MEDIATION**

**Motion to compel arbitration—existence of agreement to arbitrate—ambiguous**—In a negligence and wrongful death action filed against an elder care facility by a deceased patient's estate, the trial court properly denied the facility's motion to compel arbitration because the facility failed to prove the existence of an agreement

**ARBITRATION AND MEDIATION—Continued**

between the parties to arbitrate disputes regarding the patient's care. The arbitration agreement's signature page (which was the only page of the agreement the facility presented to the patient at the time of signing) conflicted with the facility's general admissions agreement (which incorporated the arbitration agreement by reference) where the former stated that the parties waived their right to trial while the latter expressly reserved the parties' right to a bench trial; thus, the arbitration agreement was ambiguous as a matter of law. **Gay v. Saber Healthcare Grp., L.L.C.**, 1.

**Motion to compel arbitration—existence of agreement to arbitrate—sufficiency of evidence**—In a negligence action filed against two elder care businesses (defendants) by the administrator of a deceased patient's estate (plaintiff), the trial court properly denied defendants' motion to compel arbitration where plaintiff submitted affidavits denying that the signature shown on defendants' copy of the arbitration agreement belonged to the patient's health care agent and defendants did not present any evidence in rebuttal, and therefore defendants failed to prove the existence of a valid arbitration agreement between the parties. Plaintiff's untimely submission of the affidavits did not prejudice defendants where the trial court provided defendants extra time to respond to them. Further, the trial court was not required to enter specific findings of fact regarding the affidavits' truthfulness where it adequately stated its bases for denying defendants' motion. **Register v. Wrightsville Health Holdings, LLC**, 257.

**Right to compel arbitration—waiver—acts inconsistent with arbitration—prejudice to nonmoving party**—In a negligence action filed against two elder care businesses (defendants) by the administrator of a deceased patient's estate (plaintiff), the trial court properly denied defendants' second motion to compel arbitration because defendants waived any right to arbitrate by withdrawing their first motion to compel arbitration, emailing plaintiff's counsel to say they would not pursue that motion any further, objecting to discovery requests regarding the alleged arbitration agreement between the parties, and waiting fifteen months to file the second motion. Defendants' actions were inconsistent with any claimed right to arbitrate and prejudiced plaintiff, who incurred significant litigation expenses that could have been avoided if defendants had not withdrawn their first motion. **Register v. Wrightsville Health Holdings, LLC**, 257.

**ASSAULT**

**Inflicting serious bodily injury—absence of victim's consent—not a required element**—At a trial for assault inflicting serious bodily injury (AISBI) arising from an altercation at a bar, during which defendant broke another man's jaw after the man told defendant to hit him, the trial court did not err when it declined to instruct the jury on consent because the absence of consent to an assault is not a required element of AISBI and, at any rate, a victim's consent to a criminal offense does not bar the State from prosecuting that offense. **State v. Russell**, 560.

**ATTORNEY FEES**

**Criminal case—court-appointed attorney—notice and opportunity to be heard**—In a drug trafficking prosecution, the trial court's civil judgments imposing attorney fees and an attorney appointment fee were vacated and remanded where the court entered the judgments without first providing defendant with notice and an opportunity to be heard pursuant to N.C.G.S. § 7A-455, which requires a court to conduct a colloquy with a defendant—personally, not through counsel—regarding the imposition of attorney fees. **State v. Ray**, 330.



**ATTORNEY FEES—Continued**

**Custody action—visitation rights—award against intervenor grandparents**—The trial court had the authority under N.C.G.S. § 50-13.6 to award attorney fees against intervenor grandparents seeking visitation rights in a custody action because the grandparents' action constituted an action for "custody or support" under section 50-13.1(a). **Sullivan v. Woody, 172.**

**Custody action—visitation rights—award against intervenor grandparents—reasonableness of fees**—The trial court failed to make sufficient findings regarding the reasonableness of the amount of attorney fees awarded against the intervenor grandparents as required by N.C.G.S. § 50-13.6. Although the court made findings regarding the reasonableness of the plaintiff's total attorney fees, including claims to which the intervenors were not parties, the court did not make necessary findings regarding the scope of the legal services rendered and time spent by plaintiff's attorneys specifically incurred as a result of defending against the intervenors' visitation action, necessitating remand. **Sullivan v. Woody, 172.**

**CHILD ABUSE, DEPENDENCY, AND NEGLECT**

**Permanency planning hearing—appointment as guardians—understanding of legal significance—sufficiency of findings**—Where the trial court found that the foster parents were committed to providing for the child during her minority and beyond and were willing to become parties to this action, and where the foster parents testified they understood they would be responsible for the care and expenses and medical and legal decisions for the child until she reached the age of majority, the trial court performed its duty under N.C.G.S. § 7B-600(c) in verifying that the foster parents understood the legal significance of their appointment as guardians. **In re J.M., 186.**

**Permanency planning hearing—ceasing reunification efforts—required findings**—The trial court's guardianship order ceasing reunification efforts with respondent-mother was vacated and remanded for additional findings where the order did not make findings required by N.C.G.S. § 7B-906.2(d) regarding whether respondent demonstrated a lack of success in participating or cooperating with the Wake County Human Services Department and the guardian ad litem or regarding whether respondent remained available to the court, the department, or the guardian ad litem. **In re J.M., 186.**

**Permanency planning order—unfit parent—sufficiency of the evidence**—The trial court's finding that respondent-mother was an unfit parent was supported by clear, cogent, and convincing evidence where the evidence showed that over a three-year period respondent consistently exhibited concerning behavior when caring for her children, she hit one child with a broomstick, when her children visited she often lost track of them and needed redirection to manage the children's behavior, she directed the children to sit and watch television extensively, and she allowed three-year-old J.M. to spend excessive amounts of time on a phone playing video games. **In re J.M., 186.**

**Permanency planning order—waiver of future six-month review hearings—sufficiency of the evidence**—The trial court's waiver of future six-month review hearings was supported by clear, cogent, and convincing evidence of the factors required by N.C.G.S. § 7B-906.1(n) where the evidence showed respondent-mother had been unable to adequately care for her children without additional supervision and she routinely made poor decisions—including feeding her children large

**CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued**

amounts of sugary food despite their need for significant dental work, showing three-year-old J.M. a graphic picture, and asking J.M. to watch over a baby while she attended to another child. **In re J.M., 186.**

**CHILD CUSTODY AND SUPPORT**

**Modification of custody—substantial change in circumstances—positive changes for non-custodial parent**—The trial court’s modification of custody to allow the father greater visitation and parental rights was not an abuse of discretion where father demonstrated numerous positive changes in his life—including having more stability with regard to his housing and personal relationships and addressing his mental health issues—to meet his burden of showing a substantial change in circumstances. **Padilla v. Whitley De Padilla, 246.**

**Support order—arrears—miscalculation—de minimis**—In a non-guideline child support matter, the trial court’s miscalculation of one month’s child support arrears owed by the father did not merit reversal where the de minimis error amounted to less than two percent of the father’s total arrears. **Kleoudis v. Kleoudis, 35.**

**Support order—custodial schedule—findings**—The trial court’s findings in a child support order regarding the child’s custodial schedule gave appropriate consideration to the amount of custodial time granted to the father in the permanent custody order. **Kleoudis v. Kleoudis, 35.**

**Support order—expenses for child—trial court’s determination**—In a non-guideline child support matter, the trial court did not abuse its discretion in arriving at its total of the child’s expenses where it explained its methodology, its findings were supported by evidence, and it took into account expenses attributed to the child on the father’s financial affidavit. Some of the father’s arguments would have actually led to a higher child support obligation than what was calculated. **Kleoudis v. Kleoudis, 35.**

**Support order—father’s expenses—determination based on affidavit**—In a non-guideline child support matter, the trial court did not abuse its discretion in arriving at its total of the father’s expenses, despite the father’s argument that a portion of his household expenses should have been attributed to the child, because the trial court’s determination on the father’s ability to pay was based on all the expenses listed in the father’s financial affidavit, and any reduction in the father’s expenses could actually increase the amount he would be required to pay. **Kleoudis v. Kleoudis, 35.**

**Support order—section 50-13.4(c)—findings**—In a non-guideline child support matter, the trial court did not abuse its discretion where it made sufficient findings pursuant to N.C.G.S. § 50-13.4(c) (which the father did not challenge as being unsupported by evidence) indicating it gave “due regard” to the parties’ (approximately equal) estates, earnings, conditions, and accustomed standard of living, despite not using some of the statutory language. The court was not required to make detailed findings about each individual asset and liability of the parties, and the court’s findings were supported by evidence in the form of testimony and the parties’ financial affidavits. **Kleoudis v. Kleoudis, 35.**

**Uniform Child-Custody Jurisdiction and Enforcement Act—requirement of certified copy of foreign custody determination—subject matter jurisdiction**—Where the copies of the provisional and final child-custody determinations

**CHILD CUSTODY AND SUPPORT—Continued**

petitioner-father presented to the trial court and sought to enforce under the Uniform Child-Custody Jurisdiction and Enforcement Act were stamped “Jerusalem Shar’ia Court” but did not otherwise state they were certified true copies of the original official documents, the petition did not include certified copies of the foreign custody determination as required by N.C.G.S. § 50A-305(a)(2) and -308(a). Therefore, the trial court lacked subject matter jurisdiction and its order enforcing the shar’ia court’s child-custody determinations was vacated. **Hamdan v. Freitekh, 383.**

**CIVIL PROCEDURE**

**Civil battery—motion for new trial—multiple grounds—abuse of discretion analysis**—The trial court did not abuse its discretion in denying defendant’s motions for a new trial pursuant to Civil Procedure Rule 59(a)(1), (6), and (7). There were no irregularities that led to an unfair trial where some of defendant’s arguments on appeal constituted invited error (e.g., although defendant claimed that the word “police” was used excessively during trial, he elicited testimony from police officers and his counsel used the word out of necessity, and defendant could not complain of a consolidated trial where he stipulated to no bifurcation of the punitive damages issue), and the jury’s damages award was not excessive due to the influence of passion or prejudice where it was based on evidence of plaintiff’s injuries and the impact of those injuries on his life. **Simmons v. Wiles, 665.**

**Summary judgment—mandatory notice of hearing—waiver**—Summary judgment in favor of defendant in a motor vehicle negligence action was reversed where defendant made an oral motion for summary judgment at a pretrial hearing for motions in limine but had not filed a written motion or served a notice of hearing at least 10 days in advance, as required by Civil Procedure Rule 56(c), and where plaintiff had not impliedly waived the mandatory 10-day notice requirement by participating in the motions in limine hearing. **Gary v. Wigley, 584.**

**CONFESSIONS AND INCRIMINATING STATEMENTS**

**Confession of guilt—voluntariness—hope for a lesser sentence—induced by officers’ statements**—In a prosecution for murder and other charges arising from a bar robbery, the trial court erred by admitting defendant’s confession of guilt where, under the totality of the circumstances, the officers who interrogated defendant induced him to confess by making statements producing a hope of a lesser sentence, thereby rendering the confession involuntary. Specifically, defendant adamantly denied any involvement in the robbery for most of the interrogation and confessed only after the officers promised (without any prompting on his part) to testify on his behalf and ask the judge to show leniency in sentencing. Further, because there were no positive witness identifications or physical evidence linking defendant to the crime, the court’s error was not harmless beyond a reasonable doubt. **State v. Lynch, 532.**

**CONSTITUTIONAL LAW**

**Assistance of counsel—failure to obtain valid waiver until trial—prejudicial error**—In a prosecution for breaking and entering, larceny, and injury to real property, the trial court erred in failing to either appoint counsel for defendant or secure a valid waiver of counsel until defendant’s trial—more than a year after his arrest. Instead, the court impermissibly allowed defendant to proceed pro se during the pretrial phase where defendant expressly waived his right to court-appointed

**CONSTITUTIONAL LAW—Continued**

counsel but did not clearly state an intention to represent himself, and where the court failed to conduct the entire three-part inquiry under N.C.G.S. § 15A-1242 to ensure that defendant knowingly, intelligently and voluntarily waived his right to all counsel. Moreover, the State failed to make any showing, as required, that this error was harmless beyond a reasonable doubt. **State v. Lindsey, 118.**

**First Amendment—defamation claims—ecclesiastical entanglement doctrine—**In a dispute between a church pianist and governing members of her church in which plaintiffs (the pianist and her husband) alleged multiple oral and written statements regarding the extent to which the pianist engaged in the church's prescribed reconciliation process were defamatory, resolution of those claims were barred by the ecclesiastical entanglement doctrine of the First Amendment where determination of the communications' falsity would require the interpretation of the church's internal governance mechanisms and church doctrine. **Lippard v. Holleman, 401.**

**CONTEMPT**

**Criminal—notice and opportunity to be heard—mootness—**A judgment holding defendant in criminal contempt was reversed on appeal because the trial court failed to provide defendant with summary notice and an opportunity to be heard before entering the judgment, in violation of N.C.G.S. § 5A-14(b). Although defendant had already completed his sentence, the Court of Appeals declined to dismiss his appeal as moot because it has regularly reached the merits of criminal contempt appeals where a defendant had either served the entire sentence or had no sentence at all. **State v. Perkinson, 557.**

**COURTS**

**Superior court—denial of petition for certiorari—discretionary decision—**Where the State dismissed (with leave) charges against defendant for driving while impaired and without an operator's license and the district court denied defendant's motion to reinstate the charges, the superior court did not abuse its discretion by denying defendant's petition for certiorari seeking review of the district court's ruling. Defendant failed to show that the superior court's decision was arbitrary or manifestly unsupported by reason, and his argument that the superior court was obligated to grant certiorari lacked merit because such decisions are discretionary in nature. **State v. Diaz-Tomas, 97.**

**CRIMES, OTHER**

**Neglect of an elder adult by a caretaker—status as caretaker—sufficiency of evidence—**Where defendant was charged with neglect of an elder adult by a caretaker resulting in serious physical injury (N.C.G.S. § 14-32.3(b)) after her live-in, elderly mother was left bedridden for several weeks before being hospitalized and eventually dying, the trial court properly denied defendant's motion to dismiss the charge because there was sufficient evidence that defendant was her mother's "caretaker." Although defendant did not have a close relationship with her mother, the State's evidence showed that, in the mother's final weeks of life, defendant bathed her, bought food and supplies for her, assisted her in paying her bills, assumed daily care responsibilities over her, and purchased life insurance on her behalf. **State v. Stubbs, 778.**

## CRIMINAL LAW

**Joinder—objection—no motion to sever—waiver—ineffective assistance of counsel claim**—Where the trial court—over defendant's objection—granted the State's motion for joinder of defendant's charges (arising from a series of events in which defendant killed one person and shot at another in her home), defendant waived his right to severance by failing to file a motion to sever, and the Court of Appeals declined to review the issue under Appellate Rule 2. Because the record was silent regarding defendant's counsel's reasons for not filing a motion to sever, defendant's alternative claim for ineffective assistance of counsel for failure to file the motion was dismissed without prejudice to file a motion for appropriate relief in the trial court. **State v. Yarborough, 159.**

**Jury instructions—portion of instructions read by clerk—prejudice analysis**—Although the trial court committed manifest error by having the clerk read to the jury portions of the jury instructions in a case involving second-degree murder and drug offenses, the error was not prejudicial where the trial judge told the jury the clerk would help her read some of the instructions and they should listen to the clerk, the judge interjected to correct several misstatements of the instructions by the clerk, the jury reached its verdict without the need for additional clarification, and defendant's counsel informed the trial court that he did not have any additions or corrections to the instructions. **State v. Grappo, 487.**

**Jury instructions—reliability of eyewitness identifications—non-compliance with Eyewitness Identification Reform Act**—In a prosecution for attempted robbery, the trial court's failure to instruct the jury that it could consider non-compliance with the Eyewitness Identification Reform Act in determining the reliability of the eyewitness identification was not plain error because the alleged non-compliance, the officer's failure to obtain an eyewitness confidence level statement, was not required by N.C.G.S. § 15A-284.52(c1). **State v. Reaves-Smith, 337.**

**Mistrial—impaired witness**—In a trial involving drug offenses where a witness for the State was under the influence of drugs when he testified, the trial court did not abuse its discretion in denying defendant's motion for a mistrial because the other evidence corroborated the witness's testimony, the court found the witness to be competent to testify, and the jury was informed of the witness's impairment so it could consider the credibility and weight to give to his testimony. **State v. Burgess, 302.**

**Motion for appropriate relief—ineffective assistance of counsel—test distinguished from plain error review**—When denying defendant's motion for appropriate relief, after defendant's drug trafficking conviction was upheld on appeal because defendant failed to show plain error at trial where the jury was not instructed on the defense of possession pursuant to a valid prescription, the trial court erred in concluding that the prior holding of no plain error precluded a finding that defendant received ineffective assistance of counsel. Plain error review focuses on prejudice resulting from the trial court's errors rather than from counsel's errors and requires a stronger showing of prejudice than the test for finding ineffective assistance of counsel does. Nevertheless, the trial court properly denied defendant's motion for appropriate relief based on its separate analysis applying the test for ineffective assistance of counsel. **State v. Lane, 307.**

**Motion for appropriate relief—right to evidentiary hearing—non-frivolous claims**—When reviewing defendant's motion for appropriate relief raising an ineffective assistance of counsel claim, the trial court erred in concluding that defendant's motion was frivolous where defendant raised good faith arguments supporting

**CRIMINAL LAW—Continued**

a modification or reversal of existing law. Nevertheless, the trial court properly concluded that defendant was not entitled to an evidentiary hearing under N.C.G.S. § 15A-1420 because his motion presented only questions of law. **State v. Lane, 307.**

**Plea bargain for multiple crimes—judgment for one crime vacated—entire plea vacated**—Where defendant pleaded guilty to second-degree murder, attempted armed robbery, and conspiracy to commit armed robbery pursuant to a plea agreement, the entire plea was vacated and the matter remanded to the trial court for further proceedings after the Court of Appeals vacated the judgment for attempted armed robbery due to a fatal defect in the indictment. **State v. Oldroyd, 544.**

**Post-conviction relief—DNA testing—availability after guilty plea**—Defendant's guilty plea to second-degree murder did not disqualify him from post-conviction DNA testing pursuant to N.C.G.S. § 15A-269(b)(2). Although that section requires a "reasonable probability that a verdict would have been more favorable" had DNA testing been done, and there is no verdict after a guilty plea, the General Assembly intended for "verdict" to be broadly construed to mean "resolution," "judgment," or "outcome." Further, there is a reasonable probability an innocent defendant would not have pleaded guilty to second-degree murder to avoid a first-degree murder conviction if DNA evidence had been available pointing to someone else as the killer. **State v. Alexander, 77.**

**Post-conviction relief—DNA testing—materiality**—The trial court properly denied defendant's motion for post-conviction DNA testing (after pleading guilty to second-degree murder) for lack of materiality where there was substantial evidence of defendant's guilt, and where the fact that two people were involved in the killing meant that any DNA found could have come from an accomplice and would not necessarily exonerate defendant. **State v. Alexander, 77.**

**Prosecutor's closing arguments—not prejudicial—overwhelming evidence of guilt**—On appeal from convictions for statutory rape and other sexual offenses against children, where defendant challenged multiple statements the prosecutor made during closing arguments and where each statement was subject to different standards of appellate review (depending on whether defendant objected to the statement at trial and whether the statement potentially infringed upon his constitutional rights), the Court of Appeals held that none of the prosecutor's remarks prejudiced defendant—regardless of the applicable standard of review—in light of the overwhelming evidence of his guilt, including the victims' testimony, corroborative testimony by the victims' family members, and DNA evidence linking defendant to the crimes. **State v. Ricks, 348.**

**DAMAGES AND REMEDIES**

**Punitive damages—civil battery—jury instructions**—In a civil battery case where defendant shot plaintiff during a parking lot incident, the trial court did not abuse its discretion by submitting the issue of punitive damages to the jury and providing instructions on that issue where there was sufficient evidence that defendant's actions were willful and wanton or malicious. **Simmons v. Wiles, 665.**

**Punitive damages—civil battery—willful and wanton or malicious—sufficiency of evidence to send to jury**—In a civil battery case where defendant shot plaintiff during a parking lot incident, there was sufficient evidence that defendant's actions were willful and wanton or malicious to submit the issue of punitive damages to the jury—therefore, the trial court did not err by denying defendant's motions for directed verdict and for judgment notwithstanding the verdict. **Simmons v. Wiles, 665.**

**DECLARATORY JUDGMENTS**

**Quo warranto action—request for sanctions—improper procedure—**In a quo warranto action brought by a mayor and village council member (plaintiffs) challenging the appointment of another council member (defendant), which was dismissed for failure to timely effect service, defendant's motion for sanctions against plaintiffs' attorneys—for allegedly violating N.C.G.S. § 1-521 by using public funds for counsel fees—was properly dismissed where the declaratory and injunctive relief sought should have been brought by defendant in a separate civil action, or as a counterclaim or crossclaim in an active proceeding. Although defendant argued on appeal that the trial court could have granted relief by using its inherent authority to discipline attorneys practicing before it, defendant did not cite ethical rules or seek professional discipline in her motion. **State of N.C. ex rel. Pollino v. Shkut, 272.**

**DISCOVERY**

**Sanctions—criminal case—State's failure to disclose expert witness's fee—**At a trial for assault inflicting serious bodily injury, the trial court did not abuse its discretion by declining to sanction the State for an alleged discovery violation, where the State failed to disclose an expert witness's fee to defense counsel before trial (per defendant's request). The trial court determined that the State's error was an honest mistake, nothing in the record indicated that this determination was arbitrary or unreasonable, and defendant could not demonstrate a reasonable probability of a different result at trial had he been allowed to cross-examine the expert about his fee. **State v. Russell, 560.**

**DIVORCE**

**Equitable distribution—property classification—life insurance proceeds—gift—**In an equitable distribution action, the trial court properly classified as separate property assets purchased or funded with life insurance proceeds received by a husband during the marriage, where circumstances of the transfer gave rise to a reasonable inference that the proceeds constituted a gift. The policy was purchased by the husband's former wife (with whom he had two children), the husband had not paid any of the premiums for the policy, and he was listed as the sole beneficiary. **Richter v. Richter, 644.**

**Equitable distribution—subject matter jurisdiction—claim asserted after separation—**The trial court had subject matter jurisdiction to hear a husband's claim for equitable distribution (ED), which was asserted as a counterclaim filed after the parties' date of separation. The husband's previous responsive pleading (filed prior to separation), in which he stated his intention to file an ED claim upon the parties' separation, did not constitute an actual ED claim. **Best v. Staton, 181.**

**Equitable distribution—value of marital home—evidentiary support—**In an equitable distribution action, the trial court abused its discretion by relying on a tax value when determining the post-separation passive increase in value of the marital home. Tax value listings are not competent evidence of a property's value, and in this case, the tax value was apparently never introduced by either party, precluding any opportunity for an objection. The court's order was vacated and the matter remanded for the trial court to reconsider its finding on the marital home value in light of the actual record evidence. **Best v. Staton, 181.**



**DOMESTIC VIOLENCE**

**Protective order—motion to dismiss complaint—sufficiency of allegations—attachments to complaint**—In a hearing seeking a domestic violence protective order, the trial court erred when it did not consider the detailed allegations contained in file-stamped pages attached to the AOC complaint form and dismissed the complaint for failure to state a claim. Although the completed complaint form did not directly reference the attachments, they were part of the filed complaint served on defendant, they contained sufficient allegations to state a claim under Chapter 50B, and they gave defendant proper notice of the allegations. **Quackenbush v. Groat, 249.**

**DRUGS**

**Jury instructions—guilty knowledge—plain error analysis**—The trial court did not commit plain error by failing to sua sponte give a jury instruction on guilty knowledge (regarding knowledge of the specific illegal substance at issue). Rather than contending he did not know the nature of the methamphetamine found in his home, defendant instead contended he had no knowledge of the presence of the methamphetamine and that it belonged to someone else. Even if error, the failure to instruct on guilty knowledge did not rise to plain error where the State presented copious evidence defendant was the only occupant of the home where the drugs were found. **State v. Stallings, 148.**

**Keeping or maintaining a car for keeping or sale of controlled substances—sufficiency of evidence**—In a prosecution for multiple drug offenses, the State did not present substantial evidence that defendant kept or maintained a vehicle for the purpose of keeping or selling drugs within the meaning of N.C.G.S. § 90-108(a)(7) where there was no evidence that defendant had title to or had any property interest in the car he was driving when he was pulled over (which was owned by his wife and mother-in-law), and where the evidence did not show that he “kept” the car for illegal purposes since he was observed driving it for no more than 25 minutes, and after he was stopped, the drugs were found directly on his person and no other paraphernalia related to the drug trade was found in the car. **State v. Weldy, 788.**

**Possession with intent to sell and deliver—sufficiency of evidence**—Viewed in the light most favorable to the State, sufficient evidence was presented from which a jury could reasonably infer that defendant possessed methamphetamine with the intent to sell or deliver based on the amount seized from defendant’s car (6.51 grams in a single bag), defendant’s admission that he was on his way to meet another person who had been charged with drug trafficking, and defendant’s possession of drug-related paraphernalia. Although the evidence also could have supported an interpretation that defendant possessed the drugs for personal use, given the totality of the circumstances, the issue was for the jury to resolve. **State v. Blagg, 276.**

**Trafficking—jury instructions—lesser-included charge of selling a controlled substance—total weight of tablets—plain error analysis**—Where defendant was charged with trafficking opium pursuant to N.C.G.S. § 90-95(h)(4) (which requires at least 4 grams), and the evidence showed defendant sold hydrocodone tablets with a total weight of 8.47 grams, the trial court did not commit plain error by failing to ex mero motu instruct the jury on the lesser-included charge of selling opium even though the State’s witness testified she purchased twenty 10-milligram tablets of hydrocodone from defendant. There was no conflict in the evidence regarding the weight of the hydrocodone tablets because 10 milligrams referred to the amount of the active ingredient, not the total weight of the tablets. Under section



**DRUGS—Continued**

90-95(h)(4), the total weight of tablets, pills, and other mixtures—not just the weight of their active ingredient—determines whether the amount possessed constitutes trafficking. **State v. Coleman, 91.**

**Trafficking—knowing possession—sufficiency of the evidence**—The trial court erred by denying defendant's motion to dismiss the charge of trafficking in methamphetamine for insufficiency of the evidence where, after law enforcement arranged for an informant to sell defendant methamphetamine, defendant inspected the methamphetamine (which was a mixture that contained methamphetamine) and stated it was “fake” or “re-rock” and handed it to someone else just before officers came into the room to arrest him. Because the State presented no evidence defining “re-rock” and the only evidence before the jury was that defendant thought the drug was fake, and no evidence supported an inference that defendant intended to continue the transaction, there was insufficient evidence defendant knowingly possessed methamphetamine. **State v. Campbell, 756.**

**ENVIRONMENTAL LAW**

**Judicial review of contested case—water pollutant permit—compliance with pH water quality standards**—After an administrative law judge (ALJ) affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier allowing it to discharge mine wastewater into tributaries in Blounts Creek, the superior court (reversing on other grounds) correctly concluded that the permit did not violate pH water quality standards for Class “C” bodies of water with a “swamp waters” supplemental classification. DEQ's longstanding interpretation of the applicable pH standards was reasonable, and the permit required the combined pH of the Blounts Creek waters and the discharged wastewater to remain within a range consistent with this interpretation. **Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, 674.**

**Judicial review of contested case—water pollutant permit—compliance with quality standards for swamp waters**—After an administrative law judge (ALJ) affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier allowing it to discharge mine wastewater into tributaries in Blounts Creek, the superior court (reversing the order on other grounds) properly concluded the permit reasonably complied with water quality standards for Class “C” bodies of water with a “swamp waters” supplemental classification. A preponderance of the evidence demonstrated that DEQ reasonably interpreted and applied the rules governing swamp waters and the state's antidegradation policy, and petitioners (two environmental nonprofits) failed to show that the rules imposed an additional duty to preserve swamp waters in their existing conditions. **Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, 674.**

**Judicial review of contested case—water pollutant permit—reopener provision**—After an administrative law judge (ALJ) affirmed the issuance of a permit under N.C.G.S. § 143-215.1 by the Department of Environmental Quality (DEQ) to a construction materials supplier allowing it to discharge mine wastewater into tributaries in Blounts Creek, the superior court (reversing on other grounds) correctly concluded that DEQ had authority under its “reopener provision” to reopen, modify, or revoke the permit if any unexpected water quality standard violations occurred after the permit was issued. Moreover, the reopener provision did not enable DEQ to issue a permit expected to violate water quality standards. **Sound Rivers, Inc. v. N.C. Dep't of Env't Quality, 674.**

## ESTATES

**Jurisdiction—transfer to superior court—section 28A-2A-7(b)—validity of will**—In an estate proceeding where decedent's siblings sought an order revoking probate of a holographic document submitted by decedent's long-time companion, the clerk of court properly dismissed the action for lack of jurisdiction pursuant to N.C.G.S. § 28A-2A-7(b)—therefore requiring the siblings to appeal to superior court—because the siblings' petition raised the issue of *devisavit vel non* (by arguing the submitted document was not decedent's will). **In re Est. of Worley, 27.**

**Probate—holographic document—testamentary intent—issue of material fact**—In an estate proceeding filed by decedent's siblings to revoke probate of a holographic document submitted by decedent's long-time companion titled "Last Will" and giving the companion "power of attorney" over all of decedent's possessions, the superior court erred by determining the document lacked testamentary intent as a matter of law where the document's language was sufficiently ambiguous to create a genuine issue of material fact regarding whether the document was meant to effectuate a transfer of property upon decedent's death and therefore constituted decedent's will. **In re Est. of Worley, 27.**

## EVIDENCE

**Accidental display of inadmissible evidence—prejudice—curative jury instruction**—At a trial for obtaining property by false pretenses, where defendant was prosecuted for selling boxes purportedly containing cell phones that actually contained lug nuts, and where the prosecutor inadvertently displayed an image to the jury resembling an exhibit that had been excluded from evidence and showing defendant standing in front of a mirror, wearing gold necklaces, and holding several phones, the trial court did not abuse its discretion by instructing the jury to disregard the image instead of declaring a mistrial. The court's instruction sufficiently cured any prejudice to defendant because there was sufficient evidence that defendant knew his claims regarding the phones were fraudulent (a key issue at trial), and defendant did not overcome the presumption that the jury was able to understand and comply with the instruction. **State v. Hauser, 496.**

**Expert testimony—admissibility—reliable application of principles and methods—plain error analysis**—In a prosecution for the sale of methamphetamine and possession with intent to sell or deliver a schedule II controlled substance, which arose after a confidential informant obtained a crystalline substance from defendant during a controlled buy, the trial court erred in admitting expert testimony identifying the substance as methamphetamine where the expert did not explain how she reliably applied certain testing methods in defendant's case, as required under Evidence Rule 702(a). However, the trial court's error did not rise to the level of plain error justifying a new trial because the expert explained the testing procedure itself, testified as to the results she reached, and produced a lab report detailing those results, thereby showing that her conclusions did not stem from "baseless speculation." **State v. Sasek, 568.**

**Expert testimony—basis for opinion—medical records**—In a case in which a certified nursing assistant was alleged to have committed sexual battery on a patient with advanced dementia at a skilled nursing facility, the trial court did not err by allowing testimony of a medical expert that the patient's medication may have caused her to hallucinate the incident, where that opinion was formed from facts gleaned from medical records and depositions available in the record. **Keller v. Deerfield Episcopal Ret. Cmty., Inc., 618.**

**EVIDENCE—Continued**

**Lay witness testimony—defendant’s mental capacity—intent—sufficient additional evidence**—Where defendant was convicted of murder, attempted murder, and related charges stemming from a series of events in which defendant killed one person and shot at another person in her home, there was no reasonable probability that the jury would have reached a different result if the trial court had excluded allegedly improper lay witness medical testimony regarding defendant’s mental capacity because the State presented abundant evidence that defendant intended to commit the crimes charged—including that defendant chased the first victim before killing her, drove to the second victim’s home who he knew was a nurse so she could treat his gunshot wound, and stated on the phone that he had shot the first victim and had a hostage—and the lay witness also testified in non-medical terms that defendant seemed to know what he was doing. **State v. Yarborough, 159.**

**Neglect of an elder adult by a caretaker—recorded police interview—admissibility—plain error analysis**—Where defendant was charged with neglect of an elder adult by a caretaker resulting in serious physical injury (N.C.G.S. § 14-32.3(b)) after her live-in, elderly mother was left bedridden for several weeks before being hospitalized and eventually dying, the trial court did not commit plain error by allowing a video of the mother’s interview with police to be played for the jury because defendant could not show she was prejudiced as a result. Although defendant argued that the video was the only evidence suggesting she was her mother’s “caretaker,” as defined in section 14-32.3(b), the record showed ample evidence apart from the video that adequately proved defendant’s caretaker status. **State v. Stubbs, 778.**

**Prior assault—Rule 404(b)—exclusion**—In a case in which a certified nursing assistant was alleged to have committed sexual battery on a patient with advanced dementia at a skilled nursing facility, the trial court did not abuse its discretion by excluding evidence of a prior assault allegedly committed by the nursing assistant against another resident of the facility. Even if the prior incident was substantially similar to the alleged battery, the evidence was properly excluded pursuant to Evidence Rule 404(b) where it was offered to demonstrate the dangerous nature of the nursing assistant. **Keller v. Deerfield Episcopal Ret. Cmty., Inc., 618.**

**HOMICIDE**

**Attempted first-degree murder—jury instructions—malice—use of deadly weapon**—In a prosecution for attempted first-degree murder where the evidence showed defendant injured the victim by pistol-whipping her but she was not injured when he later shot into a door after she closed it between them, any error in the trial court’s jury instruction regarding the malice element (informing the jury they could infer malice from defendant inflicting a wound on the victim with a deadly weapon) was not prejudicial error because defendant’s intentional use of his gun against the victim gave rise to a presumption that defendant acted with malice, and malice could also be inferred by the lack of provocation by the victim and verbal threats made against her. **State v. Yarborough, 159.**

**Attempted first-degree murder—malice—premeditation and deliberation—sufficiency of evidence**—The State presented sufficient evidence for the jury to reasonably conclude that defendant attempted to kill the victim with malice and premeditation and deliberation where defendant told the victim he would kill her if she did not follow his commands, he struck her over the head twice with his handgun, he stated over the phone that he had a hostage, and when the victim tried to escape by shutting the front door, defendant shot near the door handle four to six times before kicking the door and yelling. **State v. Yarborough, 159.**

**HOMICIDE—Continued**

**First-degree murder—jury instructions—self-defense**—In a first-degree murder trial where the evidence showed defendant chased the victim down and shot her after she had thrown her gun at him and ran away, defendant was not entitled to a self-defense instruction because there could no longer be any reasonable belief it was necessary for him to defend himself at the time he shot the victim. Further, defendant's testimony that he could not remember shooting the victim, along with his expert's testimony that defendant acted involuntarily due to preexisting psychological conditions, defeated his self-defense argument. **State v. Yarborough, 159.**

**IDENTIFICATION OF DEFENDANTS**

**Out-of-court identification—pre-trial show-up—eyewitness confidence statement—victim's vision information—motion to suppress**—In an attempted armed robbery prosecution, the trial court did not err when, in denying defendant's motion to suppress an out-of-court identification, it failed to make findings regarding the police officer's failure to obtain a confidence statement from the victim and failure to obtain information about the victim's vision because they were not requirements for show-up identifications under N.C.G.S. § 15A-284.52(c1) (the Eyewitness Identification Reform Act). **State v. Reaves-Smith, 337.**

**Out-of-court identification—pre-trial show-up—immediate display of suspect—Eyewitness Identification Reform Act—motion to suppress**—In an attempted robbery prosecution, the trial court did not err in denying defendant's motion to suppress an out-of-court identification where two men attempted to rob the victim and fired a gun, the victim gave a detailed description of the men to a policeman who was nearby and heard the gunshot, defendant was seen 800 feet from the crime scene seven minutes after the officer broadcast their descriptions and was apprehended shortly thereafter, and the victim identified him as one of the robbers and the person who fired the gun. The trial court's findings of fact and conclusions of law—supported by the evidence—showed that the immediate display of defendant, an armed and violent suspect, was required by the circumstances and the show-up complied with the Eyewitness Identification Reform Act. **State v. Reaves-Smith, 337.**

**Out-of-court identification—pre-trial show-up—impermissibly suggestive—likelihood of misidentification—motion to suppress**—In an attempted robbery prosecution where the victim had the opportunity to view the defendant during the crime and provided detailed descriptions of the two suspects to police, within seven minutes the suspects were seen 800 feet from the crime scene, and fourteen minutes after the attempted robbery the victim identified defendant as the person who shot at him, the pre-trial show-up identification of defendant was not impermissibly suggestive, it did not create a substantial likelihood of misidentification, and the trial court did not err in denying defendant's motion to suppress the out-of-court identification. **State v. Reaves-Smith, 337.**

**INDICTMENT AND INFORMATION**

**Fatally defective indictment—attempted armed robbery—names of victims**—An indictment for attempted armed robbery was fatally defective where it did not specifically name the victims but instead named "employees of the Huddle House located at 1538 NC Highway 67 Jonesville, NC" as victims. **State v. Oldroyd, 544.**

## JUDGES

**Judicial authority—advisory opinion—ex parte motion—no active case—disclosure of criminal investigative file**—A trial court exceeded its judicial authority by entering an advisory opinion on an ex parte motion, filed by the State and not in connection with any ongoing trial or criminal prosecution, which sought an in camera review and a determination of whether a criminal investigative file contained potentially exculpatory information subject to disclosure. The order was vacated because the court's directive to the State to disclose the file, which involved a law enforcement officer's conduct, to defendants and their counsel "in any criminal matter" in which the State intended to call the officer as a witness constituted an anticipatory and speculative judgment. **In re Washington Cnty. Sheriff's Off., 204.**

## JURISDICTION

**Bill of information—timing of filing—waiver of indictment—lack of arraignment**—In a drug trafficking case, the trial court had subject matter jurisdiction to proceed on a superseding bill of information filed after the judge's address to the jury venire but before jury selection, because the plain language of N.C.G.S. § 15A-646 did not require the State to file a superseding bill of information before trial. Further, defendant waived indictment and the information was proper in form. The lack of formal arraignment on the new charge (which corrected the type of drug at issue) was not reversible error where defendant did not object and had notice of the charge. **State v. Stallings, 148.**

**Personal—minimum contacts—nonresident ex-boyfriend—unaware of ex-girlfriend's location when contacting her**—Where plaintiff—who attended college in South Carolina—sought a domestic violence protective order against defendant—her ex-boyfriend from Connecticut—after he called her twenty-eight times on the day she moved to North Carolina even though she asked him not to contact her, defendant established sufficient minimum contacts with North Carolina to support the trial court's exercise of personal jurisdiction over him. Although defendant did not know plaintiff was in North Carolina when he called her, he knew her college semester had ended and that she might have left South Carolina; therefore, his conduct was sufficient for him to reasonably anticipate being haled into court wherever plaintiff resided when she received the calls. Moreover, the due process factors established by the Supreme Court weighed in favor of personal jurisdiction in North Carolina. **Mucha v. Wagner, 636.**

**To amend a criminal judgment—two requirements for divestment of jurisdiction**—In a prosecution for trafficking in methadone, the trial court retained jurisdiction to amend the judgment against defendant five days after its entry where defendant had already filed notice of appeal but the fourteen-day period for doing so (under Appellate Rule 4(a)(2)) had not elapsed. Under N.C.G.S. § 15A-1448(a)(3), a trial court is only divested of jurisdiction when both a notice of appeal has been given and the period for taking appeals has elapsed. **State v. Lebeau, 111.**

## MOTOR VEHICLES

**Insurance—underinsured motorist coverage—policies applicable—stacking—equal coverage limits**—The trial court's ruling that defendant was not entitled to underinsured motorist coverage under her policy issued by plaintiff was affirmed where defendant was seriously injured in an out-of-state accident while a passenger in a vehicle driven by her sister and the underinsured coverage limits of

**MOTOR VEHICLES—Continued**

defendant's policy was equal to the personal injury coverage limits under her sister's policy. Because the sisters resided in separate states in separate households (and because North Carolina law applied to the construction and application of an insurance contract between a North Carolina insurer and a North Carolina insured), pursuant to N.C.G.S. § 20-279.21(b)(4) the policies were not both "policies applicable" allowing stacking of coverages and the sum of the limits of liability for bodily injury under the sister's policy was not less than the applicable limits of defendant's underinsured motorist coverage as required under that section. Therefore, the sister's car was not an underinsured vehicle. **N.C. Farm Bureau Mut. Ins. Co., Inc. v. Lunsford**, 234.

**Operating a motor vehicle while displaying an expired registration plate—sufficiency of evidence**—The trial court improperly denied defendant's motion to dismiss a charge of operating a motor vehicle while displaying an expired registration plate (N.C.G.S. § 20-111(2)) because the State's evidence showed that an officer stopped defendant's car for not displaying a registration plate at all. **State v. Money**, 140.

**NEGLIGENCE**

**Res ipsa loquitur—broken jaw—sufficiency of allegations—applicability of Rule 9(j)**—In a wrongful death action, plaintiffs' personal injury claim asserted against a nurse under the doctrine of *res ipsa loquitur* was properly dismissed where plaintiffs' allegations failed to show the decedent's injury, a broken jaw suffered while decedent was in the hospital and under the nurse's care, was the type of injury that could only occur due to a negligent act or omission of the nurse. Therefore, the claim required a Rule 9(j) certification under the Rules of Civil Procedure, but plaintiffs' failure to include Rule 9(j) allegations regarding the nurse's actions or the broken jaw subjected the claim to dismissal. **Robinson v. Halifax Reg'l Med. Ctr.**, 61.

**PROBATION AND PAROLE**

**Probation revocation hearing—unreasonable delay—vacating without remand**—In a prosecution for various drug offenses, the trial court improperly revoked defendant's probation (for a prior, unrelated conviction) without first making the required finding under N.C.G.S. § 15A-1344(f)(3) that good cause existed to reactivate defendant's sentence fourteen months after his probation had expired. Further, because the record contained no evidence that the State made reasonable efforts to conduct the revocation hearing at an earlier date, the judgments revoking defendant's probation were vacated without remand. **State v. Sasek**, 568.

**Probation revocation—absconding—willfulness**—In a probation violation hearing, the evidence was sufficient to show defendant willfully absconded where, over a period of months, defendant did not maintain regular contact with his probation officer, never met with any probation officer prior to the filing of a violation report, was not present at any of the home visits made by officers (and the people living at the residence said he no longer lived there), failed to keep the probation officer apprised of his whereabouts, and declined the offer of an ankle monitor. **State v. Rucker**, 370.

**Special conditions of probation—drug assessment and treatment—discretionary authority**—After convictions for multiple illegal drug offenses, a special

**PROBATION AND PAROLE—Continued**

condition of probation requiring defendant to undergo a drug assessment and comply with any treatment recommendations was within the trial court's discretionary authority under N.C.G.S. § 15A-1343(b1)(10) since the requirement bore a reasonable relationship to defendant's crimes and tended to reduce his exposure to crime and assist in his rehabilitation. **State v. Chadwick, 88.**

**REAL PROPERTY**

**Housing subdivision—amendment to declaration by developer—reasonable-ness determination—**In a declaratory judgment action brought by subdivision lot owners challenging defendant-developer's decision to allow a cell phone tower to be erected on an adjacent lot, the trial court properly granted summary judgment for defendant. The subdivision's declaration of covenants and restrictions granted defendant authority to make amendments, and its amendment allowing the placement of one cell tower in order to improve wireless communication services for the residents was reasonable under the standard set forth in *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547 (2006), given the nature and character of the community and other objective circumstances. **Poovey v. Vista N. Carolina Ltd. P'ship, 453.**

**SATELLITE-BASED MONITORING**

**Lifetime monitoring—constitutionality as applied—reasonable search—hearing required—**After defendant's convictions for statutory rape and other sexual offenses against children, the trial court erred during sentencing by imposing lifetime satellite-based monitoring (SBM) upon defendant's release from prison, where the court failed to conduct a hearing—as required by *State v. Grady*, 372 N.C. 509 (2019)—to determine whether lifetime SBM constituted a reasonable search under the Fourth Amendment of the federal and state constitutions. Thus, the order imposing lifetime SBM was unconstitutional as applied to defendant and was vacated without prejudice to the State's ability to file a new SBM application. **State v. Ricks, 348.**

**Lifetime—constitutional challenge—as-applied—during versus after post-release supervision—**A trial court's imposition of lifetime satellite-based monitoring (SBM) pursuant to N.C.G.S. § 14-208.40B was unconstitutional in part as applied to defendant (who had been convicted of multiple sex offenses). Although the particular statute relied on by the trial court only refers to SBM "for life," the Court of Appeals held that the phrase was severable and upheld the portion of the order imposing SBM during defendant's post-release supervision based on the trial court's findings, which demonstrated SBM furthered the State's interest in preventing violations of post-release supervision conditions, and because defendants under supervision have a reduced expectation of privacy. The court reversed the portion of the order imposing SBM beyond defendant's post-release supervision as constituting an unreasonable search pursuant to *State v. Grady*, 372 N.C. 509 (2019). **State v. Hilton, 505.**

**SENTENCING**

**Assault with a deadly weapon with intent to kill inflicting serious injury—assault by strangulation—arising from same conduct—**The trial court erred in sentencing defendant for both assault with a deadly weapon with intent to kill inflicting serious injury and assault by strangulation where defendant beat the victim with his fists and strangled her and the evidence tended to show a single prolonged



**SENTENCING—Continued**

assaultive act with no distinct interruption between two assaults. Therefore, the Court of Appeals vacated the strangulation conviction and remanded for resentencing. **State v. Prince, 321.**

**Clerical error—written judgment—checked box—wrong punishment—**At defendant's sentencing for obtaining property by false pretenses, a box checked next to "community punishment" on the written judgment was a clerical error where the sentencing hearing transcript showed the trial court had ordered an intermediate punishment under N.C.G.S. § 15A-1340.17(c), and where other sections of the judgment reflected an intermediate punishment. Thus, the written judgment was remanded to correct the error. **State v. Hauser, 496.**

**Prior record level—dates of conviction—motion for appropriate relief—**Where defendant contended that the conviction dates for the stipulated prior convictions listed on his prior record worksheet were incorrect and the convictions were improperly used to calculate his prior record level for sentencing, and the State did not concede that the conviction dates were incorrect, resolution of the issue required consideration of evidence outside the settled record on appeal and defendant's motion for appropriate relief was dismissed without prejudice to re-file it in the trial court. **State v. Grappo, 487.**

**Prison sentence—based on two misdemeanors and an infraction—unauthorized by law—**In a prosecution for various driving-related offenses, where defendant was sentenced to ten days' imprisonment suspended upon twelve months of supervised probation, the sentence was reversed and remanded on appeal because defendant had no prior convictions, was convicted of two Class 3 misdemeanors and one infraction, and therefore should have received a sentence imposing only court costs and a fine (pursuant to N.C.G.S. § 15A-1340.23(d)). **State v. Money, 140.**

**Resentencing—prior record level—use of joinable offense—rescission of plea agreement—**Where defendant had originally been sentenced to life without parole after convictions of first-degree murder and armed robbery for offenses committed when he was 15, and—after defendant's motion for appropriate relief—the conviction of first-degree murder was dismissed and defendant pleaded guilty to second-degree murder, the trial court erred in calculating defendant's prior record level for sentencing—even though defendant stipulated to that level—by using the armed robbery conviction as a prior conviction since the robbery charge was joinable with the murder charge. Because the sentencing was pursuant to a plea agreement, the proper remedy was rescission of the plea agreement. **State v. High, 771.**

**Right to be present—to hear sentence—amended judgment—no substantive change—**In a prosecution for trafficking in methadone, where the trial court later amended the judgment against defendant in her absence, the court did not violate defendant's right to be present to hear her sentence because the amendment did not effect a substantive change to that sentence. Instead, where the original judgment sentenced defendant to 70 months of imprisonment and the amended judgment sentenced her to a minimum of 70 months and a maximum of 93 months—thereby reflecting the required sentence for defendant's trafficking charge under N.C.G.S. § 90-95(h)(4)—the amendment merely corrected a clerical error and clarified that the sentence would comport with the applicable statute. **State v. Lebeau, 111.**

**Sale or delivery of cocaine—conviction of both sale and delivery arising from same transaction—arrested judgment on lesser offense—**Where defendant was charged with the sale or delivery of cocaine under N.C.G.S. § 90-95 and the



**SENTENCING—Continued**

jury returned guilty verdicts for both sale and delivery arising from the same transfer, the trial court did not commit plain error by sentencing defendant for the greater offense of sale of cocaine after arresting judgment on the conviction of delivery of cocaine. **State v. Canady, 766.**

**STATUTES OF LIMITATION AND REPOSE**

**Wrongful death—voluntary dismissal—tolling period—new claim not asserted in first complaint—**In a wrongful death action, plaintiffs' claim against a nurse was barred by the two-year statute of limitations for wrongful death actions based on medical malpractice (N.C.G.S. § 1-53(4)) where plaintiffs' initial action, timely filed within two years of decedent's death, only included claims against other defendants but not the nurse. Therefore, the tolling provision of Civil Procedure Rule 41(a), invoked when plaintiffs took a voluntary dismissal, only applied to claims asserted in the initial complaint and not the claim against the nurse that was added to the re-filed complaint. **Robinson v. Halifax Reg'l Med. Ctr., 61.**

**TAXATION**

**Ad valorem taxes—appraisal methodology—cost approach—true value—evidentiary support—**The Property Tax Commission's determination that a county's ad valorem tax valuation of a business taxpayer's equipment did not substantially exceed true value of the property was supported by its findings of fact, which were in turn based on competent evidence, including that there was no functional or economic obsolescence affecting depreciation to require additional reductions in values. **In re Harris Teeter, LLC, 589.**

**Ad valorem taxes—presumption of validity—rebuttal by taxpayer—sufficiency of evidence—**In a challenge to a county's ad valorem property tax valuation of business taxpayer's equipment, the Property Tax Commission properly determined that the taxpayer's evidence—in the form of an expert appraiser's report and testimony—rebutted the presumption of validity of that valuation by demonstrating that the county's appraisal methodology did not reflect the equipment's true value. **In re Harris Teeter, LLC, 589.**

**Appeal to Property Tax Commission—non-attorney's submission of forms—scrivener's exception to practice of law—**A business taxpayer's appeal to the Property Tax Commission, which was filed by a non-attorney employee, was not subject to dismissal for lack of jurisdiction because the statute requiring notice of non-attorney representation (N.C.G.S. § 105-290(d2)) was not triggered by the filing of the notice of appeal and application for hearing. Production of those forms, which involved filling in blank spaces on standardized forms with basic information and with no need for the exercise of legal judgment, constituted a scrivener's exception to the practice of law and did not constitute an appearance before the Commission. **In re Harris Teeter, LLC, 589.**

**TERMINATION OF PARENTAL RIGHTS**

**Grounds for termination—neglect—probability of future neglect—**In a termination of parental rights case, the Court of Appeals reconsidered its prior opinion in light of recent Supreme Court decisions and once again determined the evidence and findings were insufficient to support conclusions that respondent-mother's actions constituted ongoing neglect or forecast a likelihood of repetition of neglect, or that

**TERMINATION OF PARENTAL RIGHTS—Continued**

respondent failed to make reasonable progress, where respondent acknowledged responsibility for the conditions that led to the removal of her children and took numerous steps to improve those conditions and become a better parent. **In re C.N., 20.**

**Incarcerated parent—dependent juvenile—alternative child care arrangement**—The trial court did not err by terminating the parental rights of respondent-father on the ground the juvenile was a dependent juvenile where respondent was incarcerated for a term of 461 years and lacked an appropriate alternative child care arrangement because his mother and sister were not appropriate placements due to the juvenile's substantial need for psychiatric care. **In re N.N.B., 199.**

**TORTS, OTHER**

**Battery—self-defense—defense of another—genuine issue of material fact**—In a civil battery case where defendant shot plaintiff during a parking lot incident, there was sufficient evidence to raise a genuine issue of fact regarding defendant's claims of self-defense or defense of another to send the claims to the jury, including defendant's acknowledged animosity toward plaintiff, defendant's statement before shooting plaintiff that "I've got something for you . . ." and then his statement after the shooting "I wish I had killed you . . . Die." **Simmons v. Wiles, 665.**

**Battery—self-defense—defense of another—genuine issue of material fact**—In a civil battery case where defendant shot plaintiff during a parking lot incident, there were sufficient inconsistencies in the evidence to raise a genuine issue of fact on the battery claim regarding whether defendant's actions were justified as self-defense or defense of another to submit those issues to the jury. **Simmons v. Wiles, 665.**

**Battery—victim shot with gun—evidence of defendant's intent to shoot**—In a civil battery case where defendant shot plaintiff during a parking lot incident, the trial court properly granted plaintiff's motion for directed verdict on the issue of common law battery based on defendant's own testimony that he purposely aimed his gun and fired at plaintiff in order to cause a non-lethal wound. **Simmons v. Wiles, 665.**

**Negligent supervision and retention—sexual battery—nursing home assistant—employer's actions**—In a case in which a certified nursing assistant was alleged to have committed sexual battery on a patient with advanced dementia at a skilled nursing facility, the trial court properly granted summary judgment to defendant facility on plaintiff's claim of negligent supervision and retention where the evidence showed the facility thoroughly vetted the employee prior to hiring him, suspended the employee pending an internal investigation following the battery allegation, and allowed the employee to resume work only after a conclusion was reached that the allegation could not be substantiated. **Keller v. Deerfield Episcopal Ret. Cmty., Inc., 618.**

**Sexual battery—alleged against nursing assistant—claim of ratification by employer—sufficiency of evidence**—In a case in which a certified nursing assistant was alleged to have committed sexual battery on a patient with advanced dementia at a skilled nursing facility, where the evidence did not support plaintiff's contention that the facility ratified the employee's actions by conducting an inadequate investigation and preventing other agencies from investigating the incident, the trial court properly granted summary judgment to defendant facility on plaintiff's

**TORTS, OTHER—Continued**

claim of ratification. The facility suspended the nursing assistant and conducted an internal investigation, timely reported the incident to state authorities, and fully complied with all third-party investigations. **Keller v. Deerfield Episcopal Ret. Cmty., Inc.**, 618.

**UTILITIES**

**Water and sewer—impact fees—authority to assess under utility commission’s charter**—Where, prior to the passage of the Public Water and Sewer System Development Act, defendant utility commission’s charter granted the authority to set fees for services rendered but contained no language authorizing fees for services to be rendered, defendant had the power to charge for contemporaneous use of its water and sewer systems but not to charge for future services. Therefore, defendant did not have the authority to charge impact fees to plaintiff developers and the charging of such fees was ultra vires. **Kidd Constr. Grp., LLC v. Greenville Utils. Comm’n**, 392.

**WITNESSES**

**Competency to testify—impairment—motion to disqualify**—In a trial for drug offenses where the presiding judge suspected that a witness for the State was impaired during his testimony and the witness testified positive for amphetamines and methamphetamine after he left the stand, the trial court did not abuse its discretion in denying defendant’s motions to disqualify the witness under Rule of Evidence 601(b) and to strike his testimony because the judge had ample opportunity to observe the witness, the witness was able to recall dates and events, other evidence presented entirely corroborated the witness’s testimony, and evidence of the positive drug test was presented to the jury for impeachment purposes. **State v. Burgess**, 302.

**WORKERS’ COMPENSATION**

**Failure to prosecute—claim dismissed with prejudice—findings—evidentiary support**—The Industrial Commission erred by upholding the dismissal with prejudice of plaintiff’s worker’s compensation claim as a sanction for failure to prosecute (based on plaintiff’s failure to fully and timely comply with discovery requests and to take any action to pursue her claim for at least a year) where the Commission’s findings were unsupported by the evidence, including that defendants were materially prejudiced and bore substantial monetary expenses as a result of plaintiff’s lack of action, and that lesser sanctions would have been inadequate based on the damage to defendants’ ability to defend the claim and because defendants would be unlikely to recoup their costs from plaintiff. **Lauziere v. Stanley Martin Cmty., LLC**, 220.

**WRONGFUL DEATH**

**Claims against hospital—respondeat superior—Rule 9(j) compliance—facial validity**—In a wrongful death action based on medical malpractice, plaintiffs’ claims against the hospital (based on the doctrine of respondeat superior and a theory of corporate negligence) were prematurely dismissed, before discovery was conducted, after the trial court determined plaintiffs failed to comply with Civil Procedure Rule 9(j), because the complaint on its face contained the necessary certification allegations. **Robinson v. Halifax Reg’l Med. Ctr.**, 61.

**WRONGFUL DEATH—Continued**

**Medical malpractice—Rule 9(j) compliance—facial validity—**In a wrongful death action based on medical malpractice, the trial court prematurely dismissed plaintiffs' complaint against two doctors for lack of compliance with Civil Procedure Rule 9(j), prior to discovery being conducted, because, as the trial court itself noted, the complaint on its face met the certification requirements. Assuming the trial court appropriately considered plaintiffs' motion to identify their 9(j) expert, which included the expert's curriculum vitae (CV), nothing in the motion or CV contradicted plaintiffs' certification assertions in the complaint and therefore could not have supported the decision to dismiss. **Robinson v. Halifax Reg'l Med. Ctr., 61.**







